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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REVEREND CALVIN O. BUTTS, III and DIGNA SANCHEZ, on behalf of themselves and all others similarly situated,

Petitioners,

—against—

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, ELECTION COMMISSIONERS MATTEO LUMETTA, FERDINAND C. MARCHI, ROSEMARY A. MILLUS, JOSEPH J. PREVITE, MARTIN RICHARDS, JAMES S. BASS, ALICE SACHS, ANTHONY SADOWSKI, BETTY DOLEN, Executive Director, ROBERT S. BLACK, President, and ORLANDO VELEZ, Secretary,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Reverend Calvin O. Butts, III and Digna Sanchez, on behalf of themselves and all others similarly situated, petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this proceeding on December 13, 1985.

QUESTIONS PRESENTED

1. In challenge to New York State's run-off primary law, did the Court of Appeals abuse its discretion in reversing the trial court's determination that the run-off primary was in violation of the Voting Rights Act where petitioners demonstrated (a) that the run-off enhances the opportunity for discrimination against minority votes; (b) that voting in elections where the voters of the City of New York are

presented with choices between minority and majority candidates have been racially polarized to a significant extent; (c) that there have been instances of appeals to race during the run-off between a minority and a White candidate in 1973; (d) that no minority candidate has ever been elected to the three citywide offices to which the run-off primary law applies; (e) that minorities in New York City bear the effect of past discrimination in the areas of education and employment which hinder their ability to participate in the political process; and (f) that there has been a long history of official discrimination in both the City and State of New York?

2. Did the Court of Appeals abuse its discretion in concluding that the factors listed in White v. Regester and identified in Section 2 of the Voting

Rights Act to serve as guideposts in determination of whether voting practice or procedure violates the Act could be disregarded in a case challenging New York's run-off primary law merely because the three offices to which the run-off primary law applied, Mayor, City Council President, and Comptroller are single-member electoral posts?

PARTIES TO THE PROCEEDINGS

All the named parties to this proceeding are listed in the caption of this petition. On February 11, 1985 the named petitioners were certified by the District Court as representatives of a class of all present and/or potentially eligible Black and Hispanic voters residing in New York City. The State of New York was originally a defendant but was dismissed pursuant to a consent order signed by the District Court on December 21, 1984.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 779 F.2d 141 and can be found in the appendix to this petition at 3a. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order which can be found in the appendix to this petition at 1a. The Opinion of the United States District Court for the Southern District of New York is reported at 614 F.Supp. 1527 and can be found in the appendix to this petition at 39a.

JURISDICTION

The Court of Appeals decision of which review is sought was issued on December 13, 1985. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 6, 1986. The decision of the United States District Court for the Southern District of New York was issued on August 13, 1985.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 (1982:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section

> establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

New York Election Law §6-162:

> In the City of New York, when no candidate for the office of mayor, city council president or comptroller receives forty percent or more of the votes cast by the members of a political party for such office in a citywide primary election, the board of elections of such city shall conduct a run-off primary election between the two candidates receiving the greatest number of votes for the same office.

PRELIMINARY STATEMENT

In 1964 the Supreme Court of the United States declared that "no right is more precious in a free country than that of having a voice in the election of those who make the laws. . ." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). More recently, in order to "insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the

future," the United States Congress took action to liberalize the standard of proof applicable to voting rights litigants. See, Voting Rights Act Amendments of 1982, Senate Report No. 97-417 at 4, reprinted in 1982 U.S. Code Congressional and Administrative News 177, 181. These actions, separated by a span of 18 years, indicate the continuing importance that has been attached to the rights of minorities to achieve effective participation in the electoral process.

This case represents a challenge to what is only beginning to be recognized as a subtle means of diluting minority voting strength through a scheme which is facially neutral but invidious in operation. In a landmark opinion bolstered by testimony of expert witnesses and practicing politicians the United States District Court for the Southern District of New York thoroughly

canvassed the facts and law and concluded that Election Law §6-162, the New York State run-off primary statute, is violative of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth Amendment of the United States Constitution.

The essence of the trial court decision is that the run-off primary has the effect of denying minority candidates the opportunity to obtain the three most powerful seats in New York City, a jurisdiction subject to the preclearance provisions of Section 5 of the Voting Rights Act.

On December 13, 1985, a panel of the United States Court of Appeals for the Second Circuit (Oakes, J., dissenting), reversed the conclusion of the District Court. Without the slightest support from the legislative history or case law, the Second Circuit panel construed the

Voting Rights Act to insulate from scrutiny New York's run-off primary law solely because the offices to which the run-off primary law applied, Mayor, City Council President, and Comptroller, were single-member electoral posts.[1]

Moreover, the panel concluded that in a challenge to a run-off primary for a single-member electoral office, the reviewing court need not review the objective factors established by White v. Regester, 412 U.S. 755 (1973), and identified by Congress in the recent amendments to Section 2 of the Act to be considered when evaluating whether an electoral practice or procedure discriminates against minority voters.

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[1] The panel also reversed the trial court's conclusion that the run-off primary violated the Equal Protection Clause. Petitioners do not seek review of that part of the panel opinion.

In the panel's opinion, even the strongest showing of the existence of the objective factors would make no difference to the outcome of the case. The Court deemed the factors to be "immaterial" in such a challenge. App. 22a.

Because the panel opinion severely undercuts minority rights to equal participation guaranteed by the Act, petitioners seek review of the panel's erroneous determination by this Court.

STATEMENT OF THE CASE

Petitioners Reverend Calvin O. Butts, III and Digna Sanchez challenged the run-off primary law of the State of New York, 17 McKinney's Consolidated Laws, §6-162 (hereinafter, §6-162), as a violation of the Voting Rights Act of 1965, 42 U.S.C. §1973 et seq., 42 U.S.C. §1983, and the First and Fourteenth Amendments to the United States

Constitution. The complaint was filed on October 15, 1984.[2]

Petitioner Butts represented all present and/or potentially eligible Black voters residing in the City of New York; Petitioner Sanchez represented the class of present and/or potentially eligible Hispanic voters residing in the City of New York.

Defendants included the City of New York, the New York City Board of Elections, and the commissioners and officers of the Board of Elections.

The relief sought by petitioners included declaratory and injunctive preventing of future operation of the statute.

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[2]A typographical error in the District Court opinion states erroneously that the action was filed in October 1985. Petitioners have corrected this error in the appendix to their petition. See App. at 42a.

The run-off primary law represents a departure from the traditional practices by which primary candidates for the citywide offices of Mayor, City Council President, and Comptroller have been selected. Prior to the passage of the run-off primary law, a candidate for any of the aforementioned offices had to win a mere plurality of the votes in a party primary. After the citywide campaign in 1969, when for the first time a minority candidate ran in a party primary for the Mayoral race, the state legislature decided to require that a candidate muster 40% of the vote before being authorized to proceed to the general election.

The run-off primary rule, though a state statute, only applies to New York City, and thus differs from electoral procedures applicable elsewhere in New York State. In every other city within

the state, Election Law §6-160 applies. That statute provides that in any contested primary, whoever wins the most votes becomes the party nominee. 17 McKinney's Cons. Laws §6-160. There is no evidence in the record to suggest that statewide elections and primaries are less contentious or complex than the primaries to which this statute applies.

Not only does the run-off rule differ from electoral practices within the State of New York, but the rule also differs from practices within the City of New York. With the exception of the three citywide offices, the rule governing all other primaries held in the City of New York is Election Law §6-160. Thus only for a citywide race must a candidate face a run-off primary in the event that s/he fails to win 40% of the initial votes.

On June 3, 1985, this matter proceeded to trial in the Southern District of New York before Judge Charles L. Brieant. The testimony adduced at trial demonstrated that:

1. There has been a long history of official discrimination against Black and Hispanic citizens in both the City and State of New York with respect to voting rights;

2. Voting in elections where the voters of the City of New York are presented with choices between minority and majority candidates has been racially polarized to a significant extent;

3. There have been instances of appeals to race during the only run-off between a minority and a white candidate in 1973;

4. The run-off statute enhances the opportunity for discrimination against minorities;

5. Minorities in New York City bear the effect of past discrimination in the areas of education and employment which hinder their ability to participate in the political process;

6. No minority has ever been elected to the three citywide offices.

In addition to the foregoing, plaintiffs demonstrated that the run-off primary places additional burdens on minority voters and candidates of their choice. Specifically, the run-off statute requires minority voters, who do not participate in the electoral process to the same extent as white voters, to vote on two separate occasions, in order to nominate candidates of their choice.

The testimony adduced at trial revealed that the greatest obstacle to minorities in the political process was surviving the primary. In light of the demographics of New York City and the

number of candidates who generally compete for the Democratic Party nomination to citywide office, a minority candidate who survived the first primary would have to compete in a run-off in order to be nominated. Thus, for minority voters and their candidates, the run-off primary becomes a majority vote requirement.

In addition to the foregoing, petitioners demonstrated at trial that the run-off primary requires an expensive media campaign due to the fact that the run-off primary is ordinarily held within 2 weeks of the initial primary. Present and former minority politicians testified that they were unable to raise sufficient funds to mount an effective media campaign. Without the financial resources to project oneself through the media, it is demonstrably impossible to compete effectively for the votes in a

city the size of New York in a two-week period. Thus the run-off primary places undue hardship on minority voters and candidates of their choice.

Finally, petitioners demonstrated that the existence of racial prejudice is still a reality in New York. The testimony revealed that, at present, New York City is a racially divided town. In each of the citywide elections since 1973, racial tensions have been a fact of life. The testimony indicated that voting has been marred by racial polarization. These racial divisions were exploited by the use of subtle or overt racial appeals by candidates, their supporters, or the media. The use of such appeals increased the extent to which the vote will be polarized.

The evidence presented at trial is reflected in the trial court's memorandum opinion. That court concluded that:

1. Racial bloc voting existed in the jurisdiction. App. 128a.

2. There were racial appeals in campaigning for the subject offices. App. 119a.

3. Past discrimination has had the effect of abridging minority voting rights. App. 116a-117a.

4. Minorities have a depressed level of voter participation. App. 117a.

5. No member of a minority has ever been elected to the subject offices. App. 129a.

6. The state's interest in the statute was tenuous. App. 129a.

Utilizing as guideposts the factors which Congress indicated should be considered in Section 2 challenges under the Voting Rights Act (these factors are listed in App. 27a-29a, opinion of Oakes, J., dissenting), the trial court concluded that based on the totality of

the circumstances, New York's run-off primary law violated the Voting Rights Act.

For reasons that will be addressed below, the Court of Appeals reversed the trial court conclusion that the run-off primary law was unlawful. In reaching this conclusion, the Court of Appeals concluded that the trial court's findings of fact were "immaterial" since the Voting Rights Act did not apply to a run-off primary law which applied to single-member electoral posts. App. 22a.

On December 27, 1985, plaintiffs petitioned the Second Circuit for a rehearing and suggestion for rehearing en banc. That petition was denied on February 6, 1986, Judge Oakes, dissenting.

REASONS FOR GRANTING THE WRIT

Section 2 of the Voting Rights Act, as amended in 1982, states that a violation of the Act exists if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity . . . to participate in the political process and to elect representatives of their choice . . . . Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

When ascertaining the "totality of circumstances," the Act requires that courts consider a number of "objective" factors which, if established, can make out a claim of violation of the Act.[3]

---

[3]The objective factors are listed in Judge Oakes' dissenting opinion at App. 27a-29a.

As the legislative history of the Act makes clear, Congress was concerned with all "practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 417, 97th Cong., 2d Sess., 28, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205. Moreover, Congress in discussing the ambit of Section 2, stated:

> Whitcomb, White, Zimmer and their progeny dealt with electoral system features such as at-large elections, majority vote requirements and districting plans. However, Section 2 remains the major statutory prohibition of all voting rights discrimination.

S. Rep. at 30.

Congress expressly recognized that in the context of racial bloc voting, "A particular election method can deny minority voters equal opportunity to participate meaningfully in elections." S. Rep. at 33. The run-off primary at

issue in this case is such a practice. There is no reason that it should be sheltered from traditional Voting Rights Act review.

The trial court conducted an intensive local appraisal applying the suggested factors, "which aid in distinguishing between merely 'losing the contest' and being deprived political access and effective participation." App. 132a. The court recognized that

> in a vote dilution case such as this one, what is being challenged is the damper on effective participation by minorities in the population; and the pertinent case law recognizes that majority vote requirements, such as §6-162, when combined with racial bloc voting, can result in diminished minority voting strength.

App. 120a (emphasis in original). The court therefore concluded that "based upon the totality of the circumstances," App. 132a, New York's run-off primary law violates the Voting Rights Act. Id.

The panel disregarded this extensive fact-finding, concluding that as a matter of law the run-off primary at issue cannot violate the Voting Rights Act since there can be "no equal opportunity for representation within an office filled by one person." App. 19a. The panel reasoned as follows:

> whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a 'share' of a single-member office.

Id.

The panel's interpretation is based solely on what the panel deems an "implicit" holding of City of Port Arthur v. United States, 459 U.S. 159 (1982), in which, the panel admits, the issue of single vs. multi-member posts was neither mentioned nor raised. Id.

This interpretation finds absolutely no support in the legislative history of the Voting Rights Act or the cases interpreting the Act. Nor does the panel opinion indicate the source of their novel interpretation that the Act does not apply to this type of challenge. Moreover, the parties never had the opportunity to brief the issue. Perhaps because of its unprecedented character, the point was never raised by defendants, and as will be demonstrated infra, was reached by the Court only through a misreading of plaintiffs' claim. In addition, this case was briefed and argued in the Second Circuit on an expedited basis, thereby precluding the kind of development necessary for an issue of such exceptional importance.

Although the panel's holding is limited to the circumstances existing in New York City, its per se reasoning is so

expansive as to apply to challenges throughout the United States where run-off statutes applying to single-member offices are challenged. This reading of the Act will allow for the potential circumvention of minority rights to participation and access by prescribing electoral systems that cannot as a matter of law be challenged under the Voting Rights Act. Certainly, a decision with nationwide implications should have the imprimatur of this Court and the opportunity for full development of the issues.

The panel reached its conclusion by effectively transforming plaintiffs' claims concerning the denial of meaningful participation into a claim that the run-off primary law denies them a share of representation. App. 18a-19a. As dissenting Judge Oakes points out, however, this restrictive reading is not

borne out by the statute, which also guarantees minorities the right to participate in the political process and, therefore, to "not be subject to any structural process that under the totality of the circumstances deprives them of equal opportunity to field a candidate. . ." App. 34a-35a.

The panel additionally failed to grasp that this is a vote dilution case. Plaintiffs' case, and the trial court opinion, specifically disavow any theory or claim that the violations allegedly stemmed simply from a failure to elect a certain percentage of minority representatives. App. 132a-133a. Rather, the petitioners alleged and proved that the run-off primary law, in the context of racial bloc voting, operated effectively to fence them out of the political process. In essence, the run-off primary law allows the dominant

(white) political factions to ignore the minority vote altogether, since the dominant factions are assured that in any run-off pitting a White against a Black canddiate, racial bloc voting will assure the White candidate's victory, irrespective of the Black vote. As Judge Oakes stated in his dissent:

> . . . a run-off primary after an initial closed primary, followed by a general election, inevitably discriminates against minority voters in New York. . . By virtue of a run-off after a closed primary election, a bloc voting white majority in what is for all practical purposes a one-party city such as the City of New York can keep a minority candidate off the ballot for the general election.

App. 35a. At trial the plaintiffs demonstrated conclusively that the run-off primary law has that effect in New York.

The claim in this case that rights to participate have been infringed cannot therefore be reduced to the claim that minorities are not adequately

"represented" in a single-member electoral post. Even accepting the panel's misconception that only "representation" is at issue here, the panel's conclusion does not follow. The conclusion rests on the assumption that "There is no such thing as a 'share' of a single-member office", App. 19a. This assumption adopts a highly restrictive view of the meaning of "representation," one which is inconsistent with the bedrock premises of representative democracy. A voter is "represented" not simply by having his candidate win, but by having his vote count in a meaningful way, so that any candidate who seeks to win has to listen to the voter's voice, and respond to the voter's needs. The New York run-off primary, combined with the reality of racial bloc voting, ensures that candidates for office can wholly disregard the Black vote, for in a

run-off between a White and Black candidate, the White candidate can prevail without a single Black vote.

In addition to concluding that the Voting Rights Act cannot be violated by a run-off primary for a single-member electoral post, the panel compounded this error by deeming petitioners' evidence of the objective factors ordinarily required to prove a violation of the Act to be "immaterial." App. 22a.

As noted above, the Court reached this conclusion by transforming a claim about meaningful participation into a claim about proportional representation. This reading is contradicted by the statute's plain language, and should not be allowed to circumvent the analysis of objective factors that all other courts heretofore have undertaken in voting rights cases. Consideration of the objective factors is absolutely necessary

to decide the merits of petitioners' claims. Those factors are the indicia by which Congress intended petitioners' claim to have been fenced out of the political process to be measured. It is through the objective factors that petitioners established that their electoral discreteness and insularity allowed dominant political factions to ignore them in the run-off primary context. For the majority to consider this evidence "immaterial" was, in effect, to bar petitioners from establishing their case.

Particularly damaging is the panel's refusal to even mention petitioners' evidence demonstrating the existence of racially polarized voting. As Judge Oakes pointed out in dissent, racial bloc voting is a "keystone in Section 2 cases." See dissenting opinion, App. 30a fn. 1 and cases cited therein.

The trial court found that the run-off, by pitting White vs. Black, could heighten racial tension and exacerbate already polarized voting patterns. App. 56a. Cf. City of Rome v. United States, 446 U.S. 156, 185 (1980). As the Supreme Court noted in Rogers v. Lodge, 458 U.S. 613, 623 (1982), "without bloc voting the minority candidates would not lose elections solely because of their race." Given the existence of racial bloc voting in New York City, the run-off statute operates to assure that if and when a minority candidate faces a White candidate in a face-to-face election such as a run-off, the minority candidate will lose. Thus, the run-off statute results in a freezing of the status quo--precisely the evil that Section 2 was designed to combat.

The majority also failed to consider the additional burdens that the run-off

imposes on minority voters and the candidates of their choice. As Judge Oakes (dissenting) pointed out:

> The time constraints require that the run-off campaign concentrate heavily on the media, which in turn significantly enhances the importance of campaign funding. This need for funds in turn disadvantages minority candidates because they often lack access to large amounts of campaign funds.

App. 36a.

Petitioners do not claim that a scheme such as that involved in this case will always violate the Voting Rights Act; only that it does so in the New York City context. However, under the panel's conclusion, such a scheme may never violate the Act.

Although concluding that the objective factors established at trial were immaterial in consideration of petitioners' appeal, the majority nevertheless proceeded to evaluate the trial court's conclusions. In doing so,

the court at no point even mentions the well-established "clearly erroneous" standard of reivew. Rather, the court merely labels the court's factual conclusions, "highly questionable." App. 22a. What the panel apparently meant by this formulation is that it disagreed with the trial court's findings.

Thus, the majority takes issue with the trial court's conclusions on past discrimination in voting rights, App. 22a; racial appeals in campaigning, id. at 22a-23a; the extent to which minority candidates have held elective office, id. at 23a; whether the state policy supporting §6-162 is tenuous, id. at 23a-24a; and the effects of discrimination in other areas, id. at 24a. In a controversial case of first impression, it is understandable that judges will have different views of the evidence submitted below. See, e.g.,

dissenting opinion of Judge Oakes at App. 29a-33a. Findings of fact, however, are not clearly erroneous simply because there may be two permissible views of the evidence. See Anderson v. City of Bessemer, __ U.S.__, 105 S.Ct. 1504, 1511-12 (1985). The panel's factual review of this case, such as it is, violates established principles of appellate review.

CONCLUSION

The panel opinion misconstrued petitioners' claims, developed an overly restrictive reading of the Voting Rights Act, disregarded the objective factors that are supposed to guide judicial review, and, to the extent it reviewed the trial court's findings at all, did so under an incorrect standard of review. The consequence of these multiple errors is to insulate from voting rights challenges an entire category of voting

schemes. As the trial court noted, "[i]f ever there were an instance when Congress anticipated judicial inquiry into legislative intent and decided to supply it, this is the instance." App. 107a. Had Congress wanted to provide a per se exception for single-member elections, it would have written that into the statute. For all of these reasons, petitioners submit that this case merits the attention of this Court.

Dated: New York, N.Y.
April 7, 1986

Respectfully submitted,

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**The attorneys for petitioners wish to express their appreciation to Joan L. Washington of the Center for Constitutional Rights for her work on this brief.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of February, one thousand nine hundred and eighty-six.

REVEREND CALVIN O. BUTTS, III and DIGNA SANCHEZ, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, ELECTION COMMISSIONERS MATTEO LUMETTA, FERDINAND C. MARCHI, ROSEMARY A. MILLUS, JOSEPH J. PREVITE, MARTIN RICHARDS, JAMES S. BASS, ALICE SACHS, ANTHONY SADOWSKI, BETTY DOLEN, Executive Director, ROBERT S. BLACK, President, and ORLANDO VELEZ, Secretary,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, Reverend Calvin O. Butts, III and Digna Sanchez, on behalf of themselves and all others similarly situated,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 325—August Term, 1985

Argued: September 17, 1985

Decided: December 13, 1985

Docket No. 85-7670

REVEREND CALVIN O. BUTTS, III and DIGNA SANCHEZ, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—against—

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, ELECTION COMMISSIONERS MATTEO LUMETTA, FERDINAND C. MARCHI, ROSEMARY A. MILLUS, JOSEPH J. PREVITE, MARTIN RICHARDS, JAMES S. BASS, ALICE SACHS, ANTHONY SADOWSKI, BETTY DOLEN, Executive Director, ROBERT S. BLACK, President, and ORLANDO VELEZ, Secretary,

Defendants-Appellants.

Before:

LUMBARD, OAKES and NEWMAN,
Circuit Judges.

Appeal from judgment of the District Court for the Southern District of New York, Charles L. Brieant, Jr., Judge, permanently enjoining defendants from giving effect to the primary run-off provision of the New York Election Law.

Judgment reversed with direction to dismiss the complaint.

Judge Oakes dissents in a separate opinion.

RANDOLPH M. SCOTT-MCLAUGHLIN, New York, N.Y. (Frank E. Deale, Juan Saavedra-Castro, Center for Constitutional Rights, New York, N.Y., of counsel), *for Plaintiffs-Appellees.*

THOMAS C. CRANE, New York, N.Y. (Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, New York, N.Y., Frederick P. Schaffer, Beth G. Schwartz, Elizabeth J. Logan, of counsel), *for Defendants-Appellants.*

Robert Abrams, Attorney General of the State of New York, New York, N.Y. (Robert Hermann, Solicitor General, O.

Peter Sherwood, Deputy Solicitor General, Frederick K. Mehlman, Assistant Attorney General-in-Charge, Litigation Bureau, Colvin W. Grannum, Frederic L. Lieberman, James Cole, Assistant Attorneys General, of counsel), filed a brief for amicus curiae State of New York.

Alan Rothstein, New York, N.Y., filed a brief for amicus curiae Citizens Union of the City of New York.

Lanie Guinier, Penda D. Hair, Maryann Walsh, New York, N.Y., filed a brief for amicus curiae NAACP Legal Defense and Educational Fund, Inc.

Esmeralda Simmons, Emanuel A. Towns, Paul Wooten, Ann C. Northern, Brooklyn, N.Y., filed a brief for amicus curiae Metropolitan Black Bar Association, Inc.

Robert Plautz, New York, N.Y., filed a brief for Intervenor Joseph R. Erazo, or in the alternative, amicus curiae.

LUMBARD, *Circuit Judge*:

The City of New York appeals from a judgment entered by Judge Brieant (S.D.N.Y.) following a bench trial, declaring that New York Election Law § 6-162 violates

both the Equal Protection Clause of the fourteenth amendment to the U.S. Constitution, and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.[1] Judge Brieant's order permanently enjoined the City from giving effect to § 6-162, more commonly known as the "primary run-off law." *See* 614 F. Supp. 1527, 1556. The City argues, first, that the district court clearly erred in finding that § 6-162 was enacted with a racially discriminatory purpose; and that therefore there is no Equal Protection violation. Second, the City argues that the district court's finding of discriminatory *effect* sufficient to constitute a violation of the Voting Rights Act rests both on clearly erroneous factual findings, and on misapplication of legal standards. Because the record shows that the primary run-off law was never intended to deny minority voters—and does not have the effect of denying them—an equal opportunity to participate in the political process, we reverse.

BACKGROUND

Political observers are agreed that the adoption of the run-off law was prompted by the unusual results of the 1969 New York City mayoral election. In the Democratic primary that year, two candidates—Herman Badillo and Robert Wagner—split the votes of the party's mainstream

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[1] The plaintiffs had also alleged that § 6-162 violated the first, thirteenth, and fifteenth amendments. Judge Brieant held that there were no first or thirteenth amendment violations, and, because he found that the Equal Protection claim existed, he saw no need to rule on the fifteenth amendment claim. Because we hold that the run-off law does not violate the fourteenth amendment, and because the standard for a fourteenth amendment violation is the same as the standard for a fifteenth amendment violation, *see Mobile v. Bolden*, 446 U.S. 55, 62 (1980), we also hold that § 6-162 does not violate the fifteenth amendment.

(Badillo receiving 28%, and Wagner 29%); as a result, the nomination went to Mario Proccacino (with 33% of the votes), who had run on a "safe streets" platform. Proccacino lost in the general election to incumbent John Lindsay, the nominee of the Independent and Liberal parties.

In 1972, Democratic State Assemblymen Stanley Steingut and Albert Blumenthal sponsored a primary run-off law. The run-off bill speedily passed the State Senate by a vote of 49-8, and the Assembly by a vote of 104-5. Governor Rockefeller subsequently signed it into law. As amended in 1976 and 1978, the law provides that if no candidate for the offices of Mayor, City Council President, or Comptroller of the City of New York receives 40% or more of the votes cast in a party's general primary, then the Board of Elections must conduct a run-off between the two top vote-getters in the general primary.[2]

Senator Bloom and other proponents of the bill argued that it was designed to avoid a repeat of the 1969 "fluke" Proccacino result, when a candidate who clearly did not represent the views of a majority of the members of his party secured the nomination because of the vicissitudes of vote division. The bill's few opponents in the Senate argued that it could have the effect of preventing blacks and Hispanics from ever electing their own candidates to the three City-wide offices covered by § 6-162. They argued, first, that the underlying motive for the law was the "Badillo scare" of 1969—that is, his garnering of 28%

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2 The original version of the run-off bill differed from the present version in that it applied to any city in New York State that had a population of over one million. Because New York City was and is the only city in the state with such a population, the law's scope of application is the same now as it was when originally enacted.

of the votes in the initial primary. Second, they pointed out that the 40% threshold figure was just above the percentage of black and Hispanic combined population in New York City at the time. Despite this criticism, and following strong rebuttal by the bill's proponents, the Senate passed it overwhelmingly. It is important to note that Senator Garcia—a leading Hispanic legislator and a Badillo supporter for the 1973 mayoralty—spoke in favor of § 6-162 in the Senate debates, and claimed that then-Congressman Badillo supported the bill. Furthermore, the bill passed in the Assembly virtually without opposition, all five black and Hispanic Assemblymen present voting aye.

The original version of § 6-162 survived constitutional challenge in *Proccacino v. Board of Elections*, 73 Misc.2d 462, 341 N.Y.S.2d 810 (Sup. Ct. N.Y. Co. 1973). Proccacino argued that the law violated the "Home Rule" provision of the New York State Constitution (Art. IX, § 2(b)), which allows municipalities to pass on State laws directed at the municipalities' "property, affairs, or government"; he also argued that the law violated the Due Process and Equal Protection Clauses of the fourteenth amendment to the U.S. Constitution. The court rejected the home rule claim on the ground that the state legislature had acted validly with regard to a matter of state concern. *See* 73 Misc.2d at 464-67, 341 N.Y.S.2d at 813-17 (citing *Adler v. Deegan*, 251 N.Y. 467 (1929)). As to the federal challenges, the court first rejected Proccacino's claim that § 6-162 deprived him of his due process rights as a voter, holding that the law embodied a rational process aimed at better reflecting "a more valid consensus of the party members." 73 Misc.2d at 470, 341 N.Y.S.2d at 818. Second, the court rejected Proccacino's claim

that, because it applied only to New York City, the law violated the Equal Protection clause. The court noted that the application to New York City alone was reasonable. *See* 73 Misc.2d at 470, 341 N.Y.S.2d at 818-19.

The run-off law has been triggered in three New York elections. In the 1973 mayoral race, the initial standings in the primary were:

Beame	34.5%
Badillo	29.0%
Biaggi	20.5%
Blumenthal	16.0%

The run-off totals were:

Beame	61.0%
Badillo	39.0%

In 1977, seven candidates sought the Democratic mayoral nomination. The results of the initial primary were:

Koch	20.0%
Cuomo	19.0%
Beame	18.0%
Abzug	16.5%
Sutton	14.0%
Badillo	11.0%
Harnett	1.5%

Ed Koch defeated Mario Cuomo in the run-off, 55% to 45%. Also in 1977, five candidates sought the Democratic nomination for City Council President. The initial standings in the primary were:

O'Dwyer	31.0%
Bellamy	25.0%

Burden	20.0%
Hirschfeld	17.0%
Stavisky	7.0%

In the run-off, Carol Bellamy overtook incumbent Paul O'Dwyer, and won with 59% of the vote.

Plaintiffs Rev. Calvin Butts and Digna Sanchez, who represent a class consisting of all present and/or potentially eligible black and Hispanic voters residing in New York City, filed this action on October 15, 1984. On December 21, 1984, the Attorney General submitted a consent order dismissing the State and the Governor as defendants.[3] The City and the Board of Elections remain as defendants.

Judge Brieant presided over a bench trial from June 3 to June 10, 1985. To support their contention that § 6-162 was intended to and does make it more difficult for a black or Hispanic candidate to receive a party's nomination, the plaintiffs offered the testimony of three leading minority political figures—Badillo, former Manhattan Borough President Percy Sutton, and former Lieutenant Governor Basil Paterson—and also the testimony of experts in the field of New York City politics. Defendants called their own expert witness, and offered extensive documentary evidence. On August 13, 1985, Judge Brieant found for the plaintiffs; subsequently, in a Final Order dated August 16, he enjoined the defendants from conducting any run-offs pursuant to § 6-162. At the defendants' request, we expedited the appeal.

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[3] Although the Attorney General was provided on January 3, 1985, with the requisite statutory notice that plaintiffs were challenging the constitutionality of § 6-162, he did not appear in the district court to defend the bill. He has, however, submitted an amicus brief urging reversal.

The district court first found for the plaintiffs on their claim under the Voting Rights Act. The court noted that Section 2 of the Act creates a private right of action for citizens to challenge allegedly discriminatory voting practices or procedures. Judge Brieant pointed out that intent is not a prerequisite to a Section 2 violation; instead, a plaintiff can prove a violation by demonstrating the existence of some combination of nine objective factors. In accordance with the Supreme Court's direction in *Rogers v. Lodge*, 458 U.S. 613 (1982), Judge Brieant focused his analysis on the "totality of circumstances," using the objective factors as a guide.

Crediting the plaintiffs' documentary evidence and their experts, the court found that the plaintiffs had met their burden of proof with respect to six of the nine typical objective factors. Judge Brieant stated that, in the "totality of circumstances," § 6-162 diminishes minorities' ability to participate in the political process; he held, therefore, that the law violates Section 2. He went on to find, alternatively, that § 6-162 violates the Equal Protection Clause because it was enacted with the *purpose* of diminishing minority participation in the political process. In making the latter finding, Judge Brieant relied upon the legislative history of § 6-162, especially the statements of the few State Senators who spoke out against it in debate as a veiled attempt to ensure that minority candidates could never achieve citywide office in New York City. Judge Brieant argued that this view fit in with what he considered to be the "anti-Badillo" sentiment that had begun in 1969 and culminated in 1972, on the eve of the next mayoral race.

DISCUSSION

Constitutional Claim—In order to hold that a law differentiates among races in violation of Equal Protection, the court must find that the law was passed—at least in part—with a racially discriminatory purpose. *See, e.g., Rogers v. Lodge, supra*, 458 U.S. at 617 (1982); *Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980). This finding requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 266 (1977). Because in Judge Brieant's view the legislative history of § 6-162 supplied "ample" direct evidence of discriminatory intent, he did not base his finding of such intent on any circumstantial evidence or on the commonly-used objective factors outlined in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds*, 424 U.S. 636 (1976) (per curiam). The City of New York argues, and we agree, that the district court's finding of discriminatory intent was clearly erroneous.

Judge Brieant began his analysis by considering the circumstances surrounding the proposal of § 6-162. Although he acknowledged that the bill may have been prompted in part by the Proccacino "debacle" of 1969, he concluded that it was mainly the result of the "Badillo scare" in the 1969 primary; he gave significant weight to Badillo's testimony that § 6-162 was called the "anti-Badillo bill" in some circles. Noting that Assemblymen Steingut and Blumenthal had originally sponsored the run-off bill, Judge Brieant referred to a dirty trick that Steingut allegedly played on Badillo in the 1973 run-off campaign. Although he conceded that this testimony was

the "rankest hearsay," he nevertheless used the story to impugn Steingut's motives in proposing § 6-162. Finally, the district court erroneously stated that Steingut and Blumenthal both were "regular Democrats," implying that they sought to weaken the voices of reform in the party. In fact, Blumenthal was an independent Democrat who supported Badillo's mayoral candidacy in 1973.

Judge Brieant also placed great weight on memoranda written by concerned parties who opposed the bill, primarily on budgetary and logistical grounds. First, the court cited a letter written by then-Secretary of State John Lomenzo, who objected because of logistics and the home rule and fourteenth amendment problems that were later rejected in the case of *Proccacino*, *supra*. Second, the court cited then-Mayor Lindsay, who wrote that he supported the "concept" of a run-off, but criticized § 6-162 as an unnecessary expenditure of city funds. Third, it cited both the New York City Board of Elections and the New York State County Officers Association, which objected because of cost and logistical burdens.

Judge Brieant conceded, on the other hand, that both the Citizens Union of the City of New York (a public-interest group) and the Association of the Bar of the City of New York had advised the Governor of their support for the bill. The court might also have noted that the media generally supported the bill. This support is demonstrated in part by several New York Times articles reproduced in the amicus brief of the State of New York. Thus, no clear conclusions can be derived from the public discussion of the run-off bill at the time; indeed, the district court's finding of discriminatory motive seems to rest primarily on statements made in the course of the Senate debate over § 6-162.

Judge Brieant placed particular emphasis on the remarks of two black Senators, Galiber and Stewart. Senator Galiber argued that the run-off bill would prevent a minority candidate from winning a city-wide election through a plurality and, consequently, from ever winning such an office. Senator Stewart opposed the law on the same grounds, arguing that the run-off was bound to degenerate into a race-based choice, and would thus extinguish the possibility of a black/Hispanic coalition candidate winning by plurality. He added that, in his view, the 40% threshold had been chosen because the black and Hispanic combined population then comprised 30% of New York City, and thus the higher figure shielded the offices from a minority coalition candidate.

We find more persuasive the contrary evidence in the record provided by the remarks of the bill's proponents. First, responding to Senator Galiber, Senator Bloom stated that the purpose of the run-off was to bolster the weakening party system by ensuring that the candidate who emerged from the primary truly represented "the thinking of the majority." The court mistakenly characterized this statement as probative of racial motivation, interpreting the word "majority" to mean "racial majority." This is clearly not what Senator Bloom meant. His statements elsewhere in the debate clarify his view that the bill was not intended to and would not have the effect of weakening the voting power of racial—as opposed to ideological—minorities. Second, responding to Senator Stewart, Senator Brydges reiterated that the purpose of the bill was to ensure representation for the ideological majorities of political parties, and emphasized his opinion and hope that a minority candidate would one day profit from the run-off law.

The members of the Senate overwhelmingly passed the bill. The results in the Assembly—where the bill was virtually uncontested—were the same, with all 5 minority Assemblymen present voting in favor of the law. The district court, oddly, found this support *probative* of racial animus in light of the evidence before the legislature that the law would be costly and logistically difficult to implement. The district court made no mention of the support that the bill received from Senator Garcia (a Hispanic), and Garcia's statement during the debate that Badillo supported the bill, even though this evidence strongly undercuts the notion that § 6-162 was intended as an "anti-Badillo" measure. The court cited the "alacrity" with which the bill moved through the Assembly and Senate (two months), and Governor Rockefeller's quick approval, as somehow probative of the discriminatory intent behind the bill.

It is a venerable principle that the legislature is presumed to act constitutionally. *See, e.g., Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 135-42 (1893). This rule was recently reaffirmed in *Mueller v. Allen*, 463 U.S. 388 (1983), where the Court noted that courts should be "reluctant to attribute unconstitutional motives to the state, particularly where a plausible [constitutional] purpose may be discovered from the face of the statute." *Id.* at 394-95. Despite this, in analyzing § 6-162, the district court minimized evidence probative of the legitimacy of the law, and as a result drew all inferences against its constitutionality.

The events leading up to passage of the bill clearly support an inference of legitimate motive. The Procca-

cino nomination badly hurt the Democratic party in New York City, and such fluke results were likely to recur as the party system further deteriorated and a broader field of candidates emerged. The application of § 6-162 solely to citywide offices in New York speaks primarily to the ideological diversity within the City and the importance of those offices. The 40% threshold, which Judge Brieant called "diabolic," was obviously chosen because Procaccino received 33% of the vote in 1969, not because of the minority population figures in New York. Finally, the speed with which the bill passed both houses demonstrates its broad-based support rather than any "nefarious" motives; this broad support is also evident from the strong minority legislative vote in favor of the bill.

At its core, the district court's holding seems to rest primarily on the statements, in debate, of the bill's opponents. The Supreme Court has, however, repeatedly cautioned—in the analogous context of statutory construction—against placing too much emphasis on the contemporaneous views of a bill's opponents. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). Rather, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.*, 341 U.S. at 394-95; *see N.L.R.B. v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). And, in fact, the legislative debates surrounding § 6-162 are filled with lengthy speeches by the law's proponents attesting to its legitimate ideological purpose; there is not a single remark by any proponent of the legislation that so much as hints at any improper purpose. We conclude that the speculations and accusations of the run-off law's few opponents simply do not support an

inference of the kind of racial animus discussed in, for example, *Arlington Heights*, *supra*, 429 U.S. at 265-68.

Accordingly, we hold that the finding of discriminatory intent in the passage of § 6-162 is clearly erroneous. New York City's run-off law does not violate the Equal Protection Clause.

Voting Rights Act Claim—The Voting Rights Act, as amended in 1982, provides that a violation of section 2 exists if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity . . . to participate in the political process and to elect representatives of their choice. . . . *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b). The legislative history of the 1982 amendments sets forth a list of objective factors, derived from the decision in *White v. Regester*, 412 U.S. 755 (1973), that is meant to aid courts in evaluating challenged laws. *See* S. Rep. No. 97-417, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207-08. Judge Brieant considered these factors and the case law interpreting them; he found that the plaintiffs had met their burden by demonstrating that § 6-162 violated six of the factors, and therefore, in the "totality of circumstances", violated section 2 of the Act.

Our central disagreement with the district court's interpretation of the Voting Rights Act concerns the kind of

electoral arrangements that can violate the Act. There are two basic ways in which members of a class of citizens may have "less opportunity . . . to participate in the electoral process." There may either be restrictive practices that deter members of the class from voting, or electoral arrangements that diminish a class's opportunity to elect representatives in proportion to its numbers. Although the Act makes clear that a class has no right to elect its members by numerical proportion, the class does have a right to an *opportunity*, equal to that of other classes, to obtain such representation.

In the context of elections for multi-member bodies, equal opportunity can be denied in a variety of ways. It would clearly violate the Act for a jurisdiction to promote class-based malapportionment by creating electoral districts with smaller populations in areas with majority voters, and with larger populations in areas with minority voters. An only slightly more subtle violation would be class-based gerrymandering: diluting the voting power of a minority area by splitting it into two or more electoral districts. A less obvious device is the use of at-large elections instead of single-member districts, which may have the effect of denying areas with large concentrations of minority voters the opportunity to pool their strength and elect members of their class from such areas. *See, e.g., City of Rome v. United States*, 446 U.S. 156 (1980); *Regester, supra*. A run-off requirement can exacerbate the unfair effect of at-large voting for a multi-member body, and has been invalidated in that context. *See City of Rome, supra*.

We cannot, however, take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for

multi-member bodies to that of elections for single-member offices. There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office. The distinction is implicit in *City of Port Arthur v. United States*, 459 U.S. 159 (1982), where the Court struck down a run-off requirement that Port Arthur had appended to its at-large voting system for seats on the multi-member city council, but made no mention of a similar run-off requirement for the election of mayor. The latter run-off was not even challenged.

Of course, it is possible to deny minority members an equal voice in filling a single-member office; this could occur, for example, if the office were chosen by a convention of delegates or a council of office-holders that had been selected on a basis that denied class members an equal opportunity to secure representation in the convention or council. But so long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. We need not determine whether such opportunity could ever be denied in the context of an election to a single-member office. It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act. The rule in elections for single-member offices has always been that the candidate with the

most votes wins, and nothing in the Act alters this basic political principle. Nor does the Act prevent any governmental unit from deciding that the winner must have not a merely a plurality of the votes, but an absolute majority (as where run-offs are required when no candidate in the initial vote secures a majority) or at least a substantial plurality, such as the 40% level required by § 6-162.

The plaintiffs contended explicitly at oral argument, and the district court appears to have implicitly assumed, that the Act condemns any electoral arrangement that makes it more difficult for a minority class to elect one of its members to office. That is not the standard for determining violations of the Act.[4] The point is illustrated by *City of Richmond v. United States*, 422 U.S. 358 (1975), where annexation of white suburbs was held not to violate the Act, even though it made it more difficult for racial minorities to win elections.

Applying the proper standard for determining whether a voting procedure even requires an analysis under the Section 2 objective factors, we believe that § 6-162 does not trigger such an analysis. First, the New York run-off law merely provides that the nominees for three City offices traditionally elected by a majority or large plurality actually represent the views of a majority or large plurality of their parties' voters. It is possible that the run-off law may make it harder for the preferred candidate of a racial minority—or an ideological minority—to

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4 The reasoning of the dissent ultimately reduces to this "difficulty of victory" test for application of Section 2. In Judge Oakes's view, § 6-162 makes it less likely that a minority candidate will be elected to one of the three offices the law covers, and therefore diminishes minority "participation" under the Voting Rights Act. As we have noted, we believe that this interpretation is supported neither by the legislative history of the Act, nor by the case law applying Section 2.

win a party's nomination, but, as we have noted, the Act is concerned with the dilution of minority participation and not the difficulty of minority victory. *See also City of Richmond, supra.*

Second, in any event, the bill has not yet had any negative effect on a minority candidate; indeed, it is not at all clear which way the law will cut—it may *help* a minority candidate to win nomination.[5] The district court suggested that the added expense of a run-off would inevitably hurt minority candidates, who have more difficulty raising campaign funds. We note, however, that the run-off in the 1977 primary for City Council President

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5 Actually, it is unsettled whether Section 2 can be violated at all in the absence of discriminatory *results*, although Judge Brieant seems to have assumed that it can. Whereas Section 5 of the Voting Rights Act (which applies only to "covered" jurisdictions) speaks in terms of the "tendency" to affect voting rights, Section 2 seems more concerned with discriminatory results. *See* S. Rep. No. 97-417, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 177, 246. It is undisputed that the run-off law has not yet had any actual discriminatory effect. On the contrary, the only minority candidate to whom it has applied, Herman Badillo, was given a second chance to win the mayoralty nomination in 1973 by virtue of the law.

We believe that the plaintiffs can challenge § 6-162 solely on the basis of its anticipated effects. In the case of *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *prob. jur. noted*, 105 S. Ct. 2137 (1985), the district court held that a Section 2 case may be brought in advance of any harmful results. *See id.*, 590 F. Supp. at 363, citing *White v. Regester*, 412 U.S. 755 (1973). It is true that *Regester* is distinguishable from this case because, although the *Regester* Court struck down an at-large system in advance of its operation, the system there had merely been reinstated and had previously operated in a discriminatory fashion. Nonetheless, we agree with *Gingles* and its interpretation of *Regester*. If we read Section 2 to require actual harmful effects, no one could challenge the run-off law until it had in fact caused the defeat of a minority candidate who won in the initial primary. This would be improper because, as the *Gingles* court pointed out, discriminatory voting laws have more subtle harms that commence as soon as they are enacted (such as deterring minority candidates from seeking office). *See id.*, 590 F. Supp. at 363. In this case, however, there has been no showing that the run-off law tends to have any harmful effect.

allowed Carol Bellamy—who seemed something of an "outsider" at the time—to overtake incumbent Paul O'Dwyer. In sum, the district court's finding that the run-off law violates Section 2 of the Voting Rights Act cannot stand.

Although the district court's application of the "objective factors" test thus becomes immaterial, we feel compelled to note our view that some aspects of the court's conclusion are highly questionable.

Past Discrimination in Voting Rights—Judge Brieant found that past discrimination in New York voting had occurred to an extent made significant by Section 2 of the Act. We are not at all convinced that the slim proof on the issue of past discrimination in New York City will entitle it to much credit in the totality of circumstances. We also note the existence of mitigating factors that further diminish the force of this showing. Unlike many of the jurisdictions typically involved in Voting Rights Act cases, New York has ensured to black citizens the right to vote on the same terms as whites since 1874 (when the fifteenth amendment was ratified). Indeed, the City has taken affirmative steps since 1975 to encourage minority voting, including mail registration (N.Y. Election Law § 5-210(1)) and a Registration Task Force appointed by Governor Cuomo.

Racial Appeals in Campaigning—Judge Brieant found that racial appeals had occurred in New York, citing various ads and flyers distributed during one election, the 1973 Beame-Badillo run-off. The source of this literature was and is unknown, however, and Beame denied any knowledge of it. Further, no evidence was shown of racial

appeals in any other elections in which minorities were candidates, and the district court failed to note the *absence* of such evidence. *See, e.g., Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 744-45 (D. Mass. 1985) (considering lack of racial appeals). We believe that the isolated incident cited here may well be a slim reed upon which to rest a finding of significant racial appeals in campaigning.

The Extent to which Minority Candidates Have Held Elective Offices—Judge Brieant acknowledged that minorities have had considerable success in winning office in New York City, but dismissed these victories as relating to "lesser offices" and not to the three positions at issue in this case; consequently, he found that this Section 2 factor had also been proved. We are not at all sure that the district court was correct in its decision to disvalue the electoral success that minorities have had in New York City simply because these victories did not involve the City's three top offices. *See, e.g., United States v. Marengo Cty. Comm.*, 731 F.2d 1546, 1572 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984) (considering evidence of electoral success in offices other than those at issue); *NAACP v. Gadsden Cty. Sch. Bd.*, 691 F.2d 978, 983 (11th Cir. 1982) (same). Indeed, this electoral success may well serve as a stark contrast to the jurisdictions involved in *Marengo Cty. Comm., supra*, and in *Jones v. City of Lubbock*, 727 F.2d 364, 368 (5th Cir. 1984), in which minorities had had virtually no representatives elected, and were not likely to in the future.

Tenuous State Policy—The district court found that the state policy behind the run-off law is tenuous, and thus that plaintiffs met their burden of proof on this impor-

tant Section 2 factor. The court's view primarily rested, however, on its finding that § 6-162 was enacted with a discriminatory purpose. We have held that the judgment of discriminatory intent in the passage of the run-off bill is clearly erroneous, and we consequently believe that there is serious question as to the district court's finding of tenuous state policy. We would also note that § 6-162, which was enacted with the motive of improving the workings of the party system in New York, appears quite distinguishable from the cases in which constituencies have suddenly adopted truly tenuous revisions to their traditional voting practices with no plausible motive other than to disenfranchise racial minorities. *See, e.g., City of Rome, supra; Marengo Cty., supra.*

Effects of Discrimination in Other Areas—The legislative history of the amendments to Section 2 also suggests that courts consider whether minorities have traditionally been discriminated against in the areas of education, employment, and health, and whether those effects linger to the detriment of minority registration and voting. Judge Brieant noted the testimony to the effect that racial minorities have a lower socioeconomic status than whites in New York City, and that persons of such status tend to register and to vote less. Judge Brieant appears not to have included this factor in the overall totality analysis, and this is of course proper in the absence of any showing that the City has in any way caused these conditions through official discrimination.

CONCLUSION

Because we believe that the district court clearly erred in finding that the enactment of the run-off law was motivated by racial discrimination, we reverse the judgment that § 6-162 violates the Equal Protection Clause. We also reverse the judgment that the run-off law violates Section 2 of the Voting Rights Act. In our view, the Act is directed at procedures that deny racial minorities a fair opportunity to participate in the electoral process, and not at those that may have the result of reducing the likelihood that a minority will elect its preferred candidate to a single-member office. Consequently, § 6-162 does not have the effects that are proscribed by Section 2; indeed, is not yet clear whether the law will diminish the voting power of racial minorities in New York City. Finally, even if the objective factors test were to be applied, we note that we have serious doubts regarding the district court's finding that the run-off law violates Section 2 when considered in the totality of circumstances.

The judgment is reversed with direction to dismiss the complaint.

OAKES, *Circuit Judge* (dissenting):

I would not reach the question whether New York Election Law § 6-162 (1978), the primary run-off law, violated the Fourteenth or Fifteenth Amendments (although I have trouble with the district court's finding that the law was enacted for discriminatory purposes under *Rogers v. Lodge*, 458 U.S. 613 (1982)), because I believe

that the district court properly found that the law does have a discriminatory effect so as to violate section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982).

In 1982 Congress added subsection (b) to section 2 of the Voting Rights Act to make explicit that section 2 could be violated by a showing of discriminatory effect as well as intent. As amended, section 2 reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The statute thus frames the question for us as whether "based on the totality of circumstances" the primary run-off law causes a race- or color-based class of voters to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." As the majority opinion correctly points out, at n.5, it is the anticipated effect of the law with which we are concerned, *see Gingles v. Edmisten*, 590 F. Supp. 345, 363 (E.D.N.C. 1984), *prob. juris. noted sub nom. Thornburg v. Gingles*, 105 S. Ct. 2137 (1985), since discriminatory voting laws, by their very adoption, may affect minority political participation in subtle ways, e.g., by deterring minority candidates from seeking office.

The courts may consider as one circumstance the extent to which members of a protected class have been elected to the office(s) affected by the primary run-off law, and I note that no minority candidate has been elected to any of the three offices so affected (mayor, city council president, comptroller). While the law establishes no right to have members of a protected class elected in numbers equal to their proportion in the population, no one contends for such a right here. The legislative history of the 1982 amendment to section 2 spells out seven additional criteria or factors derived from *White v. Regester*, 412 U.S. 755 (1973), which we may look to in making our overall determination:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction [mentioned specifically in the statute].

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07 (footnotes omitted).

Two additional factors mentioned in the Senate Report are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, pre-

> requisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, 1982 U.S. Code Cong. & Ad. News at 207 (footnotes omitted).

Judge Brieant, recognizing that it is the "totality of circumstances" that must be examined, and that the nine factors mentioned in the Senate Report are only "guidelines," 614 F. Supp. 1527, 1543 (S.D.N.Y. 1985), relied on the following factors mentioned in that report: (1)—history of past discrimination; (6)—racial appeals in campaigning; (2)—racially polarized voting; (7)—the extent to which candidates have held elective offices, particularly the offices affected by the law in question; and the "tenuous[ness]" of state policy. To a lesser, and more speculative, extent he relied also on factor (5). I think the district judge's findings as to these points, set forth at 614 F. Supp. at 1544-48, speak for themselves, are supported by the evidence, and cannot be deemed clearly erroneous. I incorporate them by reference in this opinion.

The majority opinion discusses these findings so as to cast doubt on their validity. Its reference to past discrimination, however, does not take into account some of the litigation in this court, *see, e.g.*, *United Jewish Organizations v. Wilson*, 510 F.2d 512, 516-17 (2d Cir. 1975) (1972 redistricting in Bronx, Kings, and New York Counties running afoul of section 5 of the Voting Rights Act), *aff'd sub nom. United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). It also fails to demonstrate that Judge Brieant was clearly in error in finding that

> historical evidence of past inequality when combined with evidence of lower socio-economic status and lower rates of voter registration, supports a finding

> that a plaintiff class member has less opportunity to nominate and elect a candidate of choice under a statute which requires a superplurality in the initial primary election (40%), or the burdens associated with running two primary campaigns.

614 F. Supp. at 1544-45 (factor 5 above referred to).

It is true that Judge Brieant's reference to racial appeals in campaigning, 614 F. Supp. at 1545, referred only to the 1973 primary, but that was the only run-off primary involving a minority candidate for one of the three offices in question. Judge Brieant found "overwhelming[ ]" evidence that such appeals were made. *Id.* The majority opinion does not explain why the fact that these appeals could not be directly attributed to the minority candidate's opponent should be of relevance. The important inquiry, as the trial court found, was that the racial appeals were made and "were made possible or gained strength due to existence of the short run-off period [of three weeks]." *Id.* The majority opinion does not mention this factual finding.

Judge Brieant's findings of racially polarized voting, 614 F. Supp. at 1545-47, based as they are in substantial part on statistical regression analysis, which is the standard method of analysis of racially polarized voting, *NAACP v. Gadsden County School Board*, 691 F.2d 978, 983 (11th Cir. 1982); *Gingles*, 590 F. Supp. at 367 n.29, are not mentioned, let alone challenged, in the majority opinion.[1] All that is necessary is that racial and ethnic

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[1] I believe that a finding of racial-bloc voting is a "keystone" in a section 2 case, *see, e.g., United States v. Marengo County Comm'n*, 731 F.2d 1546, 1566-67 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *see also United Jewish Orgs. v. Carey*, 430 U.S. at 166 n.24. Although the evidence here is not overwhelming, the district court's finding of

polarization and bloc voting exist to a significant degree; Judge Brieant so found, 614 F. Supp. at 1547. Any insistence on more comprehensive and extensive statistical evidence on prior elections for the offices at issue to prove racial bloc voting would effectively insulate voting schemes until the requisite number of elections had occurred in which there had been minority candidates and in which sufficient information was available upon which to base a valid statistical analysis. In this case there were three mayoral elections in the thirteen years between the

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racial-bloc voting cannot be deemed clearly erroneous. The judge relied on both statistical (regression analysis) and somewhat anecdotal evidence on city-wide (and state and national) elections from 1973 to 1984. The trial courts similarly relied on anecdotal and statistical evidence in *City of Rome v. Georgia*, 472 F. Supp. 221, 227 (D.D.C. 1979), *aff'd sub nom. City of Rome v. United States*, 446 U.S. 156, 183-84 & n.20 (1980); and in *Major v. Treen*, 574 F. Supp. 325, 351 (E.D. La. 1983). Other courts have found bloc voting by analyzing even fewer results. *See, e.g., Latino Political Action Comm. v. Boston*, 609 F. Supp. 739, 745 (D. Mass. 1985) (two elections). The time period considered—1973-1984—was almost as long or longer than that considered by other courts. *See, e.g., Marengo County Comm'n*, 731 F.2d at 1551-52 (1966-78); *Gingles*, 590 F. Supp. at 367 & n.28 (1978-82, although 53 elections studied); *Latino Political Action Comm.*, 609 F. Supp. at 745 (1983 only); *Jordan v. City of Greenwood*, 599 F. Supp. 397, 402 (N.D. Miss. 1984) (1969-81). Nor was the district court's discounted consideration of national or state issue elections improper. *City of Rome*, 472 F. Supp. at 227. Although the regression analysis did not show bloc voting to the extent found in some Southern areas, it was statistically significant.

The appellants challenge the court's failure to consider evidence of "cross-over" voting in local New York City elections. However, the district court's finding that the willingness of white voters to vote for blacks for less visible and important positions is not probative on how whites vote in city-wide elections does not appear to be clear error. The contention that plaintiffs must demonstrate *why* voters voted racially should be rejected, as this would render Congress's amendment of section 2 inoperative by again making the proof burden insurmountable. Thus, the court's finding of racial polarization was not clear error, nor were improper legal standards applied. *Compare Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1481 (11th Cir. 1984) (Wisdom, J.).

passage of § 6-162 and Judge Brieant's decision. While regression analysis was performed only for the 1977 mayoral election, according to Dr. Engstrom's testimony, the information upon which to base a regression analysis was not available for 1973. In 1981 no minority candidate ran for mayor.

Judge Brieant recognized that minorities have had considerable electoral success in New York in non-city-wide contests. He balanced this against the striking fact that no minority candidate has been elected to an office where the law requires a run-off primary. In the absence of any minority success for the three offices in which this unique intermediate hurdle exists, the majority's discussion of this finding—highlighting that "minorities have had considerable electoral success in New York City"—seems to me beside the point.

As to the tenuousness of the state policy found by Judge Brieant, the majority opinion refers principally to the trial judge's reliance on discriminatory purpose. Even if one accepts that the run-off law was enacted with the most beneficent of purposes, however, it has a certain tenuousness. It applies to only one city in New York. It applies to only three offices, and then only to the party primary, not the general election, so that while a party's nominee must garner at least 40% of the party vote (or 50% in case of a run-off), he could become mayor with a significantly lower percentage of support. Finally, New York City is the only one of the seventeen largest cities in the United States with minority populations large enough to support a black or Hispanic mayoral candidacy, but not so large as fully to dominate the political scene, that has a run-off *primary* (as opposed to a run-off election

used in twelve of such cities).[2] I think it proper to consider the uniqueness or limited scope of an election law in determining "tenuousness," and under this standard New York's primary run-off law may properly be considered tenuous.

Because Judge Brieant's factual findings are not clearly erroneous, I am obliged to approach the section 2 question from the factual premises of the district judge, a position which I apparently do not share with the majority. So approaching it, I face the interesting and difficult question posed by the majority: does the Voting Rights Act apply only to at-large elections or elections for multi-member bodies, and not to elections for single-member offices, or can there be "less opportunity . . . to participate in the political process" when that process involves an election for a single-member office? With certain qualifications (such as the case of an office filled by a convention) not relevant here, the majority asserts that there cannot be less opportunity where there is a single-member office, because "[t]here can be no equal opportunity for representation within an office filled by one person."

I believe the majority misses the point of the 1982 amendments to the Voting Rights Act. The Senate Report states,

> As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, designedly *or otherwise*, to minimize or cancel out the voting strength and political *effectiveness* of minority groups, are an impermissible denial

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2 This information is set forth in Attachment C to the amicus brief of Citizens Union of the City of New York submitted *in support of reversal* of Judge Brieant's decision.

> of the right to have one's vote fully count, just as much as outright denial of access to the ballot box.

S. Rep. No. 417, *supra*, at 28, 1982 U.S. Code Cong. & Ad. News at 205 (footnote omitted) (emphasis added).

> The requirement that the political processes leading to nomination and election be "equally open to *participation* by the group in question" extends beyond formal or official bars to registering and voting, or to maintaining a candidacy.
>
> As the Court said in *White*, the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality."

Id. at 30, 1982 U.S. Code Cong. & Ad. News at 208 (footnote omitted) (emphasis added). The majority focuses on minority opportunity for "representation," but ignores the statute's and legislative history's emphasis on opportunity to "participate." There is simply nothing in the Act or the legislative history that would indicate a congressional intent to protect from scrutiny single-member office election laws, particularly when they contain unique provisions such as a party primary run-off, that may deny minorities an opportunity to participate equally. *See id.*, 1982 U.S. Code Cong. & Ad. News at 207.

It is true that blacks and Hispanics have no right under the Act to a proportionate "share" of the offices of mayor, comptroller, or city council president. But they do have a right not to be subject to any structural process that under the totality of circumstances deprives them of equal opportunity to field a candidate for one of those offices. It is my view, as I believe it was the view of the

district judge, that the run-off primary is such a process, because a run-off primary after an initial *closed* primary, followed by a general election, inevitably discriminates against minority voters in New York, even though I think a run-off election after an *open* primary, or a general election after a party primary, does not involve any more discrimination than is inherent in the size of the voting group, per the majority's reasoning here.

By virtue of a run-off after a closed primary election, a bloc-voting white majority in what is for all practical purposes a one-party city such as the City of New York can keep a minority candidate off the ballot for the general election. Such a candidate has three hurdles to leap in order to win election—he must be among the top two finishers in the initial party primary (bloc voting would likely prevent him from reaching the 40% threshold that would enable him to avoid a run-off),[3] he must win the run-off primary if he has not won 40% of the vote, *and* he must then win the general election. In the more usual case of a run-off election after an open non-party primary, there are only *two* hurdles to be jumped and a number of minority candidates in cities which have such a system have won election. As to New York City, we can easily hypothesize a scenario in which in a two-step election a non-white candidate wins a plurality in the Democratic primary and then attracts a sufficient number of the overwhelmingly Democratic electorate to defeat a white Republican rival for the mayoralty. Because of the third hurdle of a run-off in a closed primary—perhaps because of the brevity of time involved, the expense such a run-off involves, or the

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[3] Judge Brieant noted that a 30% level might pass muster. 614 F. Supp. at 1556. I do not reach that question.

dynamics of a closed primary run-off, which the testimony showed tend to encourage racial polarization, or perhaps because of all three factors—the minority candidate is disadvantaged. In my opinion, such a disadvantage in a racial-bloc voting city already subject to the preclearance provisions of the Voting Rights Act, as New York is, is a violation of section 2 of the Act. Moreover, the run-off effectively converts the closed primary into a majority vote system. Although not a per se violation of the Act, majority vote requirements have been criticized in at-large systems for submerging racial minorities. *See City of Rome v. United States*, 446 U.S. 156, 183-84 (1980); *Zimmer v. McKeithen*, 485 F.2d 1297, 1306 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

The district court found, at least implicitly, that each of the three factors flowing from a closed primary run-off affects minority political participation. Under New York Election Law § 8-100(1)(b) the run-off must be held within two weeks of the initial primary election. The time constraints require that the run-off campaign concentrate heavily on the media, which in turn significantly enhances the importance of campaign funding. *See* 614 F. Supp. at 1530-31, 1533, 1536. This need for funds in turn disadvantages minority candidates because they often lack access to large amounts of campaign funds. *Id.* at 1533. The dynamics of a run-off primary also exacerbate racial polarization. *Id.* at 1531-33. The district court apparently agreed with the opinions expressed by Basil Paterson, an elected State Senator and Lieutenant Governor and appointed Deputy Mayor of the City of New York and Secretary of State for the State of New York. Mr. Pater-

son's testimony was summarized as follows by the district court:

> Mr. Paterson added factual corroboration to the testimony of Mr. Badillo and Mr. Sutton concerning the need for campaign funds to purchase television time for a short runoff primary campaign. His testimony in essence was that television and other forms of media coverage have replaced party organizational support as the most important factor in a citywide campaign. (Tr. 174-75).
>
> In 1985 Mr. Paterson considered the possibility of running for the Democratic nomination for the office of Mayor. He estimated that it would cost approximately $2.2 million to conduct a "reasonable campaign", planning only on the basis of one primary and the general election. If a run-off primary were held, Mr. Paterson estimated that he would need an additional $.5 million. This estimate is reasonable.
>
> Mr. Paterson discussed at length his opinions concerning the effect of the run-off primary law upon the candidacy of a minority member. He noted among other things that the history of run-off primaries or indeed any one on one election campaign conducted during a short period reveals that such a campaign is likely to be very intense, marked by a high emotional level experienced during the condensed period of time. Because insufficient time is allowed for debates or street electioneering or other traditional methods, the need for television time and the quick expenditure of large sums of money is overwhelming if a candidate is to prevail in the run-off. The short period of time allowed is insuffi-

> cient to respond to new attacks on a candidate's qualifications, position or platform and therefore such a campaign lends itself to dirty tactics, assuming there is such a thing as Marquis of Queensberry rules in politics. Furthermore, he expressed a firm view that voters in a one to one run-off election following such a short intense campaign are more likely to vote on racial lines.

614 F. Supp. at 1536. Taking that testimony as true, as I believe the district court did, the closed primary run-off election law of New York acts to discourage minority candidates from seeking office and lessens the chances for success of those who choose to run. In my opinion, such a result violates section 2 of the Voting Rights Act by having the effect of discouraging equal participation in the electoral process by minority voters and in lessening their oppportunity to elect representatives of their choice. Accordingly, I dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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REV. CALVIN O. BUTTS, III and DIGNA SANCHEZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

84 Civ. 7373 (CLB)

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, ELECTION COMMISIONERS MATTEO LUMETTA, FERDINAND C. MARCHI, ROSEMARY A. MILLUS, JOSEPH J. PREVITE, MARTIN RICHARDS, JAMES S. BASS, ALICE SACHS, ANTHONY SADOWSKI, BETTY DOLEN, Executive Director, ROBERT S. BLACK, President, and ORLANDO VELEZ, Secretary,

MEMORANDUM AND ORDER

Defendants.

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Brieant, J.

Plaintiffs, suing in behalf of a class consisting of all present and/or potentially eligible Black and Hispanic voters residing in New York City, seek injunctive and declaratory relief holding that New York Election Law §6-162 violates the United States Constitution, the Voting Rights Act, 42 U.S.C. §1973,

and the Civil Rights Act, 42 U.S.C. §§1981, 1983. The challenged New York statute is a run-off primary law, applicable only to the City of New York and there only to the three city-side offices. It states in full:

> "In the city of New York, when no candidate for the office of mayor, city council president or comptroller receives forty per cent or more of the votes cast by the members of a political party for such office in a city-wide primary election, the board of elections of such city shall conduct a run-off primary election between the two candidates receiving the greatest number of votes for the same office."

This statute was enacted originally in 1972 and made applicable to cities with a population of one million or more. New York is the only such city. In 1976 and 1978 the state legislature amended the statute to read as quoted above. In every other city in the state, and in elections for noncity-wide offices in New York City, New York Election Law §6-160

applies. It provides that in any contested primary, whoever wins the most votes becomes the party nominee.

Since 1972, a total of three run-off primary elections have been held in New York City pursuant to the statute. All were held for the Democratic Party. Two run-offs were for the mayoral nomination and the third was for nomination for the office of City Council President.

Plaintiffs Calvin O. Butts and Digna Sanchez are representatives of a class consisting of all present and/or potentially eligible Black and Hispanic voters residing in New York City. This action was certified as a class action pursuant to Rule 23, F.R. Civ.P., following a February 11, 1985 hearing at which this Court made oral findings. Adequate notice of the pendency of the class action was published; no plaintiff class members requested exclusion.

As originally filed on October 15, 1984, [the year of filing was misprinted as 1985 in the reported opinion and corrected herein--petitioners' correction], this action named the State of New York and its Governor as defendants. On December 21, 1984 the Attorney General of New York submitted a consent order dismissing the State and the Governor as defendants. This was proper. On January 3, 1985, the Clerk of the Court provided statutory notice, required under 28 U.S.C. §2403(b), informing the Attorney General that plaintiffs here challenge the constitutionality of New York Election Law §6-162. Since that date the Attorney General has declined to appear or defend the validity of the statute in this

Court. See Endorsement Order of January 3, 1985 in this action.[1]

This Court conducted a non-jury trial beginning on June 3, 1985 and concluding on June 10, 1985. The parties were permitted to submit post-trial memoranda which have been filed and considered. There follows the Court's findings of fact and conclusions of law.

Plaintiffs essentially contend that the run-off primary law infringes upon the constitutional rights of Black and Hispanic voters to equal protection and due process, and that the operation of the run-off statute was intended to and does make it more difficult for a Black

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[1]Although the State's Attorney General declined to appear, the challenged statute was defended skillfully by Beth G. Schwartz, Thomas C. Crane and Elizabeth J. Logan, attorneys of counsel to Frederick A.O. Schwarz, Jr., Corporation Counsel for the City of New York.

or Hispanic candidate to emerge as the party nominee. Plaintiffs offered evidence in support of the theory that the effect of the run-off statute is to give class members less opportunity than other members of the electorate to participate successfully in the electoral process to the extent of nominating members of their class. Defendants claim that the statute has no discriminatory impact on any particular social, racial or ethnic group in New York City.

As will be anticipated by any reader vaguely familiar with New York City politics, the evidence in this case included animated testimony concerning the recent history of Democratic party affairs, the ever changing atmosphere of race relations in the City, and the recent campaigns of various office seekers. Plaintiffs offered the testimony of three prominent political

figures, Herman Badillo, a Hispanic, and Basil Paterson and Percy Sutton, both of whom are Black. Each witness described his personal experiences in city-wide election campaigns in terms both vivid and trenchant. In addition, experts appeared for both plaintiffs and defendants to express their opinions from a more academic perspective.

The facts which have emerged from the trial testimony and the documentary exhibits are these. In 1973, there were four candidates in the initial primary for Mayor--Mario Biaggi, Albert Blumenthal, Herman Badillo, and Abraham Beame. The percentages of total votes obtained by each of the candidates were:

Abraham Beame	34.5%
Herman Badillo	29.0%
Mario Biaggi	20.5%
Albert Blumenthal	16.0%

A run-off election was held in which Mr. Beame resoundingly defeated Mr. Badillo, by the following percentages of

the total votes cast:

Abraham Beame	61%
Herman Badillo	39%

In 1977, there were seven candidates seeking the Democratic Party nomination for Mayor--Edward Koch, Mario Cuomo, Abraham Beame, Bella Abzug, Percy Sutton, Herman Badillo and Joel Harnett. The results of the initial primary election were as follows:

Edward Koch	20.0%
Mario Cuomo	19.0%
Abraham Beame	18.0%
Bella Abzug	16.5%
Percy Sutton	14.0%
Herman Badillo	11.0%
Joel Harnett	1.5%

Mr. Koch was the winner of the 1977 run-off primary, defeating Mr. Cuomo. He received 55% of the total votes cast.

In the third run-off primary, held in 1977 for the office of City Council President, the results were as follows. In the initial primary there were five white candidates who received these percentages of total votes cast:

Paul O'Dwyer	31%
Carol Bellamy	25%
Carter Burden	20%
Abraham Hirschfield	17%
Leonard Stavisky	7%

Ms. Bellamy won the run-off election with 59% of the vote, defeating the incumbent, Paul O'Dwyer. Ms. Bellamy, who also won the general election, is currently serving as City Council President and is a candidate for the 1985 Democratic nomination for Mayor.

As can be gleaned from the figures stated above, except for Mr. Badillo, no Black or Hispanic candidate has participated in a run-off primary under this statute. In recounting his political career, Mr. Badillo told the COurt that he held his first elective office beginning in 1965 when he served as Borough President of the Bronx. In 1970, Mr. Badillo began the first of four elected terms as a United States Congressman. In 1970 he was elected to

Congress as a representative of a tri-borough district covering a portion of the South Bronx, a portion of Manhattan in East Harlem, and Astoria, a portion of Queens. For his second, third and fourth terms he was elected from a Congressional District covering only the South Bronx.

In 1969, prior to the adoption of the challenged statute, there was a contested primary for the Democratic nomination for Mayor. Mr. Badillo, the only minority candidate, nearly won. The results were as follows:

Mario Procaccino	33%
Robert Wagner	29%
Herman Badillo	28%
James Scheur	5%
Norman Mailer	5%

Mr. Badillo testified that:

> "The general view of the campaign is that I lost to Mario Procaccino by 38,000 votes, which was astonishing because of the fact that Norman Mailer got about 42,000 votes and Norman Mailer carried--not carried but got votes in the [Greenwich] Village and other areas

> which I had done very well in, so it was clear that if Mailer had not been a candidate I would have won the primary.
>
> That was surprising because of the fact that since no Puerto Rican had ever run for citywide office before, people suspected I would only get 5 or 10 percent of the vote. No one thought I would come within that narrow a margin of winning." (Tr. 81).

The final results of the 1969 general election for Mayor were that incumbent John Lindsay, running that year as an Independent and Liberal Party candidate, won in a three way race, receiving about 42% of the total vote. The Democratic nominee, Mario Procaccino, was defeated. The experiences of 1969 inspired the enactment of the run-off statute, which was known in Albany legislative circles as the "Badillo bill," or perhaps more properly the "anti-Badillo bill."

Mr. Badillo made a second try for the mayoral nomination in 1973, after the

enactment of the run-off statute, and achieved the second highest percentage of votes cast. According to his testimony, which we consider credible since it can be assumed that a political candidate can and will review and evaluate his own election results with some reasonable degree of accuracy, Mr. Badillo received support from essentially the same groups of voters in 1973 as he had in 1969. That is, most of his votes came from the Bronx, where he had served as Borough President and Congressman, and from "Manhattan and the black, Hispanic and so-called liberal areas of Brooklyn and Queens." (Tr. 79). Mr. Badillo received votes from white voters whom he described as "the liberals which were then known as reformers. . . ." (Tr. 88) This testimony is generally in conformity with the testimony of other witnesses to the effect that there exists a significant

constituency of liberal white New York City Democratic voters who will support a qualified Black or Hispanic candidate.

In describing his 1973 campaign experiences, Mr. Badillo provided support for one of plaintiffs' dominant factual arguments underlying their legal theory--the importance of campaign funding and its enhanced importance during a short run-off campaign period as provided for here. First, Mr. Badillo explained that his political philosophy and platform and indeed that of most minority candidates and those who support them, do not appeal to most wealthy donors or special economic interests because it focuses on "liberal" or redistributive policies such as rebuilding poor areas of the City and developing educational and employment programs for the poor at the expense of and sometimes to the detriment of other

interests in the body politic. Mr. Badillo described his campaign as a "street campaign," dependent, not on big money or big media, but rather upon personal appearances which reach voters without substantial expenditures of money. For example, while campaigning for the Bronx Borough Presidency, Mr. Badillo set as his goal shaking 5,000 hands every weekday and 9,000 hands on Saturdays and Sundays. According to his testimony, "there are two types of campaigns. One is a media campaign based on money. The other one is a street campaign based upon your physical presence in the neighborhoods. The media campaign can be a short campaign, and that's what the run-off is geared for." (Tr. 90).

In addition to testifying that as a representative of minority and poor interests Mr. Badillo did not generally

have the support of wealthy campaign contributors, and therefore lacked the ability to purchase radio and television time, Mr. Badillo stated that he also faced difficulty in obtaining "free" media coverage. According to this witness, a candidate who tries to call a press conference in a poor urban area, or who wants to talk about problems of the poor at a press conference, does not receive the media attendance enjoyed by conferences held in midtown Manhattan, or the attention paid to other issues.

Finally, Mr. Badillo described personal experiences in campaign events characterized by their racial tone, which took place during the short 1973 run-off period, but not during the longer initial campaign period. During the 21 day run-off period between the initial primary election on June 4, 1973 and the secondary primary election on June 26,

Badillo's opponents distributed literature misrepresenting or emphasizing Badillo's position on issues said to have racial connotations, such as scatter site subsidized housing and employment quotas and busing of students. There were flyers distributed connecting Badillo to "slum country" and to groups perceived as violent such as the Black Panthers and the Young Lords, a Puerto Rican organization which had recently captured and occupied the Lincoln Hospital and a Baptist Church in East Harlem under threat of force.

This "campaign literature" speaks eloquently as to how a short run-off campaign may be made nasty by direct appeals to racial or ethnic bias. Exhibit 26, used in the run-off is a two-sided flyer or handbill, featuring a picture of slum dwellings, accompanied by the caption, "This is the Bronx Herman

Badillo helped to build. Don't let him do this to New York." The reverse side of Exhibit 26 states: "Elect Abe Beame, a Mayor for all the people on June 26. Our last chance to save New York City."

Exhibit 27 used also in the 1973 run-off is a flyer printed both in Italian and English which states:

> "If you don't vote for Abe Beame on Tuesday, blame yourself on Wednesday. Abe Beame's opponent supports. . . scatter-site housing . . . busing. . . quotas in hiring and education. . .[and] Abe Beame's opponent is supported by the Black Panthers and Young Lords."

According to the witness, Badillo, Exhibit 27 was distributed in Italian-American neighborhoods in New York City, and was designed to frighten such residents into voting for Beame in the run-off to protect their neighborhood and life style. (Tr. 107). An examination of this exhibit would seem to indicate on its face that it was printed with the run-off primary in mind, and

after the field had narrowed to two candidates. It is probably insignificant whether the flyer contained patently false statements as to Mr. Badillo's actual position on any particular issues. He testified, however, that his true position was well publicized through debates with other candidates and news coverage insofar as concerns issues such as busing and quotas. Although in favor of busing he had never endorsed quotas and has always supported the merit system of job employment. (Tr. 107, 114). Whether completely false or only partly false the campaign literature used in the run-off primary contains a rather unsubtle racial appeal aimed at misleading white voters who are against quotas in hiring and education and constitutes a rather naked appeal to the racial prejudice which many majority

voters are reliably believed to possess. (See Tr. 55-61).

We do not suggest that this leaflet or any of the similar materials presented at trial were actually the work of Abraham Beame, or persons acting with his authority. Mr. Beame is generally perceived to be of moderate political views and indeed was described at trial as being essentially a "technocrat." This point itself is of significance, however, because in a short run-off campaign it is possible for the question of the authenticity of a particular statement to be fudged until after the elction is over. In a lengthy campaign, such as the ordinary primary contest, unfair appeals to racial bias are generally counter productive because they can be investigated, exposed and criticized; but in the short period of a run-off this usually cannot be done and

an unauthorized blow strikes just as hard as one which was issued with authority.

Exhibit 29 is essentially in the same vein. It is a paid political advertisement in a local Brooklyn newspaper, The Canarsie Courier, which appeared five days before the Beame-Badillo run-off election. This advertisement falsely describes Badillo as a supporter of "a quota system rather than a merit system" and represents Mr. Badillo as associated with one Luis Fuentes, a Puerto Rican school district official who had been involved in a recent dispute concerning the affairs of a community school district in Manhattan's Lower East Side, which dispute had negative racial or ethnic overtones.

Exhibit 30 calls on voters to "Vote for Beame on June 26, 1973. Vote as if your life depends on it, because it does.

He will save New York City." This piece of literature, an advertisement in The Jewish Press, dated Friday, June 22, 1973, was, according to the witness, also an appeal to prejudice made during the run-off campaign period:

> "Q: The phrase that to "vote as if your life depends on it, because it does," what did you take that to mean?
>
> A. An appeal to racism. An appeal to threaten the life style of the Jewish community if they were to vote for me, and therefore it was an appeal for Jewish people to vote for Abe Beame on the grounds that he would preserve that life style, and I wouldn't, which of course is absolutely false." (Tr. 116).

Exhibit 31 is a phony page from a non-existent newspaper, "The Brooklyn News," also dated during the run-off period. This piece of literature contains statements such as "Badillo wants Forest Hills type projects throughout the city except where he lives." At the same time there was a public controversy over a proposal to

erect subsidized "scattersite" housing in a luxury neighborhood. It also features a photograph of slums with the label, "Badillo Country."

In addition to the literature distributed during the 1973 run-off period, Mr. Badillo testified that his opponents devised another novel tactic, a flatbed truck carrying a group of Black and Hispanic bongo drum players, reportedly playing drums from ten o'clock at night until one o'clock in the morning while driving through white, residential areas of Brooklyn, the Bronx and Queens, and saying "Vote for Badillo so we can take over City Hall." Mr. Badillo testified that an investigative reporter for the weekly newspaper Village Voice, tagged the flatbed truck "the Stanleymobile" because the idea was said to have originated with Stanley Steingut, then Speaker of the Assembly and also

chief sponsor of the bill which became N.Y. Election Law §6-162. (Tr. 96).[2]

In Mr. Badillo's opinion racial appeals to voters are only effective in New York during a one to one campaign:

> "The first primary, there were four people involved, and since nobody knew who was going to come off first or second, if I had been eliminated there would be no need for it. This material was obviously held in the event that I would come out first or second in the first primary, because this is what is called negative campaigning. Negative campaigning, any media person will tell you, is most effective in one to one campaigning. It is not effective where you have a multi-candidate campaign because the negative strategy cannot be measured as effectively." (Tr. 108-09).

Mr. Badillo also offered his opinion as to the reason behind the dramatic

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[2] This anecdote is, of course, the rankest hearsay, of the sort which fast becomes a legend in politics.

increase in the number of votes cast for Beame in the run-off. In the initial primary Beame received 34.5% of the votes cast while Badillo received 29%. In the run-off primary, Beame's percentage increased to 61% whereas Badillo's grew only ten percentage points--to 39%.

> "Q: Is there any way you can attribute the increase in the vote, the dramatic increase for Mr. Beame as opposed to your own increase, but not as dramatic?
>
> A: To the runoff primary. That is the purpose of the runoff primary. The runoff primary, because it has in those days only three weeks, automatically favors the individual who has the most money, and beyond what you have talked about in terms of literature, there were millions of dollars spent by Mr. Beame and his different campaign committees on television, in the newspapers and the radio and in literature, and in a runoff primary the candidate with the most money automatically has the greatest advantage.
>
> Naturally, in my case and as far as I know in case of any black or Hispanic, it would be a very damaging factor since I didn't have comparable amounts of money nor does any black or Hispanic that I know of. Number one.

Number two, when you add to that the appeals to racism, you have the kind of panic that you can set off on a one-to-one campaign where there is a limited period of time because you don't have enough time to overcome this, you don't have enough time to conduct an investigation.

You can complain, as I did in one of the final TV debates. I complained to Mr. Beame and he claimed that he had nothing to do with the literature but, of course, by the time that complaint was filed, the election was over and all of the investigations that I am talking about did not even begin until after the election was over.

Q: Were you able to raise funds for the runoff campaign in '73?

A: Yes, but not--when you only have three weeks, as I mentioned to you before, most of the funds that I raised were at dinners, hotels or Tavern on the Green, other such places or cocktail parties. It takes time to set up a dinner because you have to send a mailing out and get on the phone and call up people. If you are dependent on that type of resource for fund raising instead of picking up the phone and asking someone for $5,000 or $10,000 or $15,000, if you are dependent on dinners and cocktail parties, by definition a short campaign of less than three weeks would make it very difficult to raise significant amounts of money. (Tr. 120-22).

A second plaintiff's witness to offer evidence of his personal campaign experience and the expertise which accumulates during a political career was Mr. Percy Sutton, who was been active in New York's Democratic party politics for over thirty years. In fact, Mr. Sutton testified that he lost elections for eleven consecutive years before finally winning a New York State Assembly seat in 1964, representing a district in central Harlem. For eleven years he lost to "whatever candidate had the support of [Congressman] Adam Clayton Powell, Jr." (Tr. 25). This testimony opened the door to a subject covered exhaustively by the academic experts for each side, and discussed more fully below, that is, the subject of party strength and control over primary elections and the nomination process. Without oversimplifiying, there was once a time within recent history

when party leaders elected by the district leaders or precinct committeemen for each county met often to discuss party affairs and sponsor candidates. They did so under the aegis of a de facto citywide leader, although the New York City party machinery does not have a provision for a City Chairman. These county leaders decided with the approval of their supporters who would be the regular, or endorsed party nominees. This they did with a view towards elective success and considering assurances on the part of the candidates that they would be loyal to party principles, channel such party patronage as might exist in the proper approved directions and support the electoral efforts of others. These party leaders often contrived a so called "balanced ticket" where different candidates for different offices possessing different

local or racial or ethnic appeal would add to the strength of each other by running as a slate or team. Furthermore, during this time, now long gone, a selection as the Democratic nominee tended to assure success in the general election and contested primaries were few and far between. That this is no longer true is highly relevant to our discussion of the effect of New York's run-off statute on the opportunity to select candidates and specifically on the opportunity of ascertainable minority groups protected by the Voting Rights Act to exercise their franchise to the fullest extent in order that they and those whom they may support may run for office without being disadvantaged by reason of their minority status.

Mr. Sutton's career spanned the period of evolution during which these changes took place. Remembering the

"golden years" of Democratic organization politics in New York, Mr. Sutton commented obiter as follows:

> "I have found more morality among persons in government and in politics than I found in business, and I am a businessman. I was a businessman before I went into politics, I am now a businessman with no involvement in politics and the word of people in politics and government that I recall was stronger and could be depended upon more often than those I find in business today." (Tr. p. 47).

This Court with a personal experience of shorter duration in a different party in a different county agrees wholeheartedly.

Mr. Sutton during the years in which he was losing was a so called "reform" candidate opposed to the traditionalist or "machine" candidates sponsored by Congressman Powell, and it cannot be said that any of those contests were racially polarized. The difference if any between reformers and machine politicians is a subjective one and those reformers who

gain power tend sooner or later to become machine politicians in their own right attacked in turn for that great sin by later generation of "reformers." Reformer Sutton in 1966 was chosen by the City Council to serve as Borough President of Manhattan, filling the vacancy created in that office by the resignation of Hon. Constance Baker Motley, now Chief Judge of this Court.

Although the statutory power to fill a vacancy created by such a resignation belongs to the majority of City Council members voting, in reality, when as in 1966 there is a strong and vigorous party organization in New York County with a strong leader and the majority of the City Council belongs to that party, the recommendation of the County leader or the Executive Committee of the party translates into the appointment by majority vote on the Council of the party

organization's choice as the candidate to fill the vacancy. As Mr. Sutton put it, "I was selected simply because there was a very strong county organization and the head of that county organization favored me." (Tr. 26). "When I was selected by the City Council in 1966, J. Raymond Jones[3] was the county leader and it was a strong organization, but not merely as strong as it had been during the days of Tammany Hall and the people before J. Raymond Jones." (Tr. 27-28). Mr. Sutton went on to describe how once he had been appointed it became relatively easy to win election because he had the support of the district leaders and their groups of political workers, and because

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[3]Mr. Jones, a highly regarded political leader in New York County, was a Black man elected by a Democratic party organization consisting of a majority of white members.

incumbency in the office provided its own access to media coverage and the sort of community involvement likely to create a favorable image and name recognition with those voters who do not merely vote the party line.

After serving as Manhattan Borough President for almost 12 years, Mr. Sutton became in 1977 the first Black candidate to seek the Democratic nomination for Mayor of the City of New York. Of the seven candidates in the initial primary, Mr. Sutton received 14% of the total number of votes cast, leaving him 5% short of Mario Cuomo, who as runner-up (19%) competed with Edward Koch (20%) in the run-off election. The rest is history. Mr. Cuomo went on to become Governor of the State of New York--Mr. Koch is currently serving his second term as Mayor while seeking reelection for a

third term, and Mr. Sutton is again a businessman.

Although Mr. Sutton never participated in a run-off primary, he encountered some of the same campaign problems described by Mr. Badillo. He was unable to raise the funds required for an effective media campaign, and his campaign suffered because once he announced his candidacy for a citywide office, Mr. Sutton was labelled a "Black" candidate expected to gain only the "Black" vote. (Tr. 46). Mr. Sutton attributed his difficulty in raising funds to the fact that "there were statements made on the radio, television, and in print to the effect that I was not likely to be able to win because of the limited number of Blacks living in New York City . . . ." (Tr. 43). Having the media label him the "Black" candidate came as a surprise and disappointment, he

said, because he had spent over twelve years participating in state and local political activities, actively building a broad-based constituency, winning elections in New York County, and had not theretofore been considered or spoken of merely as a "Black politician." Before the mayoral race Mr. Sutton commissioned a poll which suggested that he was "on par or superior in public perception to other persons who were predicted to be candidates." (Tr. 46). As it turned out, Mr. Sutton's votes did in fact come from the primarily Black districts in the City, and he received few votes from white districts. Whether this was in whole or in part the result of a "self-fulfilling media prophesy," as he suggests, or evidence of racial bloc voting, is not capable of precise determination. However, Mr. Sutton's opinion is that had he not been isolated

as the leader of a Black-only constituency, and had he been able to raise funds, he would have received many more votes from the larger audience he would have been able to reach.

Mr. Sutton also testified as to his opinion, in 1972, on the likely effect of the newly enacted run-off statute:

> "A: My opinion was it was going to be in injuring minorities.
>
> Q: In what way?
>
> A: In every other office in New York State if there are five candidates, four candidates, three candidates running, a plurality is required to win the primary.
>
> For the first time when this statute became law, only in New York City was there a requirement that there be a runoff, runoff for the offices of mayor, president of city council and comptroller, all citywide offices.
>
> No such requirement [exists] for borough president, no such requirement [exists] anywhere else in the State of New York, so it looked to me that now what is going to happen, [since] the city is now becomming more and more populated by minorities. There is a thing called prejudice. Many of us are able to

overcome it. But the persons who suffer most the prejudice, social, economic, political, were Hispanics and Blacks. Blacks and Hispanics were beginning to register to vote in larger numbers, consolidating their efforts in a voter registration campaign, and if a plurality was needed only, a possibility was there for winning a primary election and being the designee of the party.

If there was to be a runoff, one, it would be more difficult to raise money to run with a runoff when you are a member of a minority.

Secondly, you would in a runoff be pitted against one of those three or four, two or three other persons who were in the primary, and if people were to exercise their prejudices and it was to be exercised negatively, then you would lose the [run-off] election.

So I saw it as against the best interests of Hispanics and Blacks or minorities. And I spoke out to that effect." (Tr. 51-52).

Plaintiffs' third witness having a political career was Mr. Basil Paterson, who was elected to the State Senate in 1965 and who has held various appointive offices including Deputy Mayor for the City of New York and Secretary of State

for the State of New York. Mr. Paterson added factual corroboration to the testimony of Mr. Badillo and Mr. Sutton concerning the need for campaign funds to purchase television time for a short runoff primary campaign. His testimony in essence was that television and other forms of media coverage have replaced party organizational support as the most important factor in a citywide campaign. (Tr. 174-75).

In 1985 Mr. Paterson considered the possibility of running for the Democratic nomination for the office of Mayor. He estimated that it would cost approximately $2.2 million to conduct a "reasonable campaign," planning only on the basis of one primary and the general election. If a run-off primary were held, Mr. Paterson estimated that he would need an additional $.5 million. This estimate is reasonable.

Mr. Paterson discussed at length his opinions concerning the effect of the run-off primary law upon the candidacy of a minority member. He noted among other things that the history of run-off primaries or indeed any one on one election campaign conducted during a short period reveals that such a campaign is likely to be very intense, marked by a high emotional level experienced during the condensed period of time. Because insufficient time is allowed for debates or street electioneering or other traditional methods, the need for television time and the quick expenditure of large sums of money is overwhelming if a candidate is to prevail in the run-off. The short period of time allowed is insufficient to respond to new attacks on a candidate's qualifications, position or platform and therefore such a campaign lends itself to dirty tactics, assuming

there is such a thing as Marquis of Queensberry rules in politics. Furthermore, he expressed a firm view that voters in a one to one run-off election following such a short intense campaign are more likely to vote on racial lines.

In 1970 Mr. Paterson won a contested Democratic primary election for Lieutenant Governor, receiving about 86% of the vote statewide. He won in 61 of the State's 62 counties. This points to the conclusion that Mr. Paterson received a large number of votes from white voters, a fact pertinent to our discussion for two reasons. First is the witness' explanation that in 1970 he had the support of almost every Democratic county leader in the State--a fact which contributed to his success in 1970 but which he believes would not be as significant a factor today, when party

organization exerts much less influence over voting behavior. Second is the witness' differentiation of offices perceived by the public to be "top spots" as opposed to less authoritative, standby or administrative offices such as Lieutenant Governor. Mr. Paterson voiced a strong belief that voters who will vote for a qualified Black or minority candidate for the position of Lieutenant Governor will not vote for a Black candidate for Governor, because the Lieutenant Governor's position is "a spot that the public does not believe has any consequence." (Tr. 222). On the same reasoning, New York City voters will elect a minority candidate to the office of Borough President, as in the case of both Herman Badillo and Percy Sutton but, according to Paterson, will not vote similarly in the Mayoral election. (Tr. 223).

Plaintiffs and defendants both produced expert witnesses who testified as to their conclusions based upon studies of voting behavior in New York City, and the effect of N.Y. Election Law §6-162. Appearing first for plaintiffs was Dr. Richard Engstrom, Professor of Political Science at the University of New Orleans. Dr. Engstrom testified, as he has done in previous unrelated litigation concerning Section 2 of the Voting Rights Act, as to his conclusions based upon correlation and regression statistical analysis applied to three citywide elections in which a Black or Hispanic candidate appeared on the ballot. These elections were the 1977 Democratic mayoral primary, the 1982 Democratic primary for Lieutenant Governor, and the 1984 Democratic

Presidential primary.[4] In his opinion, voting patterns in these elections demonstrate a clear pattern of racially polarized voting.

Essentially, his conclusion that voting was racially polarized means that Black voters registered a clear preference for Black candidates, Hispanic voters registered a clear preference for Hispanic candidates, and non-Black,

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[4]Dr. Engstrom's report (PX 7) and testimony contain detailed descriptions of the methodology he employed and the proper interpretation of data using correlation and regression analysis, which would be too lengthy to repeat here. His report showed his method of adjusting the problem of assembly districts having a substantial combined population of both Blacks and Hispanics (multivariate analysis). His study also took into account the fact that the total minority population of any assembly district is larger than the voting age population. When adjustment was made to reflect voting age population only, Dr. Engstrom concluded that the degree of racial polarization in voting behavior became more pronounced.

non-Hispanic voters (from the "homogenous" districts where over 90% of the voting age population was neither), gave the minority candidate almost no votes. Dr. Engstrom conducted his analysis by statistical comparison of two variables: (1) the racial composition of geographical units, the Assembly districts, and (2) the numbers of votes cast for a particular candidate in each assembly district. Using these measurements, Dr. Engstrom plotted charts summarizing the relationship between these two variables. The slope of the "regression line" drawn between the horizontal and vertical axis on each chart provides an estimate of the strength of the relationship between the racial or ethnic composition of the districts and the vote for minority candidates. In all three of the elections he studied, Dr. Engstrom found

that as a precinct's minority population increased, so did the tendency for the minority candidate to garner more votes. For example, in the 1977 mayoral primary, Dr. Engstrom reported that Mr. Badillo received 79.2% of the Hispanic vote and Mr. Sutton received 72.4% of the Black vote, while neither of these candidates received over 2.4% of the votes cast in eight homogenous, non-Black/non-Hispanic assembly districts. (Tr. at 252).

Plaintiffs' next expert witness, Dr. William O'Hare, testified as a specialist in the academic fields of "demography research methodology, social psychology and urban sociology." (Tr. at 333). His testimony addressed the subject of how social and economic differences between whites and minorities in New York City are related to differences, if any, in levels of political participation. Dr. O'Hare's report (PX 8) offered evidence

that Blacks and Hispanics in New York City generally have a lower socio-economic status than do Whites, and that groups having a lower socio-economic status register to vote and vote at lower rates than groups having higher socio-economic characteristics. The characteristics examined by Dr. O'Hare in determining such status were yearly family income, education and occupation. The data on which he relied were taken from the 1982 Current Population Survey conducted by the U.S. Census Bureau.

Not surprisingly perhaps, the tables in PX 8 reveal that Whites make up a proportionally higher percentage of the "white-collar" workers in New York City, and that persons in the higher income categories, also Whites, have completed more years of school than have Blacks or Hispanics. For example, 56.9% of the Hispanics in the sample had less than a

high school education, compared to 36.8% of the Black respondents and only 30.5% of Whites. In the income category, 32.1% of Whites reported yearly incomes of $25,000 or more, whereas only 13.9% of Blacks and 11.1% of Hispanics belonged in this group.

The relationship between these statistics and levels of political participation shows that persons with higher incomes register to vote at higher rates than persons with lower incomes. Among those with a yearly income of less than $7,500, 46.9% of the sample said that they were registered, compared to 55.9% in the $7,500 to $14,999 category; 58% in the $15,000 to $24,999 category; and 67.7% among those with yearly incomes higher than $25,000. Similarly, a person who has completed more years of schooling is more likely to register to vote. The incidence of registration and voter

turnout grows with each increase in educational level among the persons sampled.

Years of School	Percent Registered	Percent of those registered who voted
less than 12 yrs.	46.8	79.5
12 yrs/H.S. grad.	57.2	85
13-15 yrs./some college	66.1	87.3
16 yrs. or more/ college grad.	74	87.6

It was an additional conclusion of Dr. O'Hare's study that race or ethnic background operates as an independent depressant on minority voter participation in New York City. As is illustrated in Tables 4.2 and 4.3 of his report (PX 8), if the difference in voter participation were solely due to income level, than Whites and Blacks in one income category would be expected to participate (register or register and vote) at approximately the same rates. However, Table 4.2 reports that even in the lower income brackets, Whites are

more likely to register than are Blacks or Hispanics:

Yearly Income	Blacks	Whites	Hispanics
Less than $7,5000	43.3%	58.7%	31.9%
$7,500 to $14,999	48.0%	64.0%	49.9%
$15,000 to $24,999	60.6%	61.6%	43.8%
$25,000 or more	73.9%	71.2%	52.1%

While this tendency may be explained in part by the fact, for example, that the Black and Hispanic populations contain more persons who are under the voting age (Tr. 348), it is illustrative of the generally low rate of plaintiffs' participation and the resulting adverse impact of a majority vote requirement rather than a plurality system.

Plaintiffs' fifth expert witness was Dr. Stanley Aronowitz, Professor of Sociology at the Graduate Center of the City University of New York, who teaches courses on the subject of New York City politics.

Dr. Aronowitz' lengthy testimony described the recent history of New York City party politics from his own perception. In his opinion, the City was controlled under a tradition, dominant until about 1969, under which floating coalitions of special interest groups battled for political power. Floating coalitions existed because there have been no alliances of long standing based on race, class or identifiable ideological or economic considerations; rather, under specific circumstances various racial or ethnic voting blocs have shifted allegiances among various candidates. We agree with defendants' expert, Dr. Fuchs, that this tradition might be due in part to the pluralistic character of the New York City population, reflecting its position as a port of entry for various waves of immigrants during all of our history as a

nation, and it may be due in part to the geographical and political structure of the boroughs which have tended to prevent overall city unity, subsequent to the arbitrary imposition of the merger of 1901 creating the greater City of New York as it now exists.

The modern era of City politics began with the election of reformer Fiorello LaGuardia to the office of Mayor in 1933. LaGuardia, a Republican running on a "Fusion" ticket, received the support of Black and Hispanics which he retained throughout his career as Mayor. His first election came about as a result of a series of outrageous scandals in municipal government which discredited the Democratic Party. His election resulted in displacing the political patronage system in City government which had supported Tammany Hall for more than a century. Mayor LaGuardia established a

fusion coalition comprising the Republican Party in the City, independent business groups, so-called "good government" groups, and after 1937, a large portion of the labor movement.

In 1945 when Mayor LaGuardia declined to run for a fourth term, Blacks and Hispanics began to transfer their allegiance to the Democratic Party, which succeeded in electing Mayor William O'Dwyer. He resigned under an aura of scandal, and was succeeded by Vincent Impelliteri, a Democrat, who defeated Justice Ferdinand Pecora, Democrat, and Edward Corsi, Republican in a special election in 1950, running on an independent "Experience Party" ticket. The special election was called too late to permit a primary, and party nominations were made by the County Committee.

The next strong successful citywide candidate was Mayor Robert F. Wagner, who served three terms from 1953 to 1965. In 1953 minority voters generally supported Wagner, but in the latter part of his career, Mayor Wagner came under heavy criticism from both the Black and Hispanic communities, for two reasons: dissatisfaction with housing relocations directed under the City's urban renewal program, and a mistaken perception that he favored the landlords during the massive rent strikes of 1963 and 1964 which took place in Harlem, East Harlem and Bedford Stuyvesant, all Black and Hispanic residential areas.

During the early part of the 1960's the Democratic Party suffered a deep split as a "reform" movement fought against the "regular" organization that had backed Mayor Wagner.

In 1965 John V. Lindsay, then a Republican and former Congressman from Manhattan's wealthy east side, was elected to the office of Mayor, defeating Democrat Abraham Beame and Conservative William F. Buckley. During his terms in office, Lindsay was successful in forming a new coalition of labor unions, minority groups and liberal or progressive business groups concerned with improving race relations. Lindsay's administration, coinciding with the national Civil Rights movement, and facing the problem of white flight away from the center city, chose to forge an alliance that supported a strong role for minorities in City government. In this he was successful, and the City was spared from the riots which affected other similar communities. By 1968, according to Dr. Aronowitz, "the regular political organizations in Manhattan

. . . are substantially weakened to the point where they can't really in most places any longer seriously contest for countywide political power." (Tr. 382).

While the Democratic machine was undergoing internecine warfare between the "regulars" and the "reformers," primarily a struggle for power rather than an ideological or philosophical difference, the Lindsay administration successfully captured the support of a coalition including the former "LaGuardia reformers"--those voters concerned with honest government, as well as the support of virtually all of the Black and Hispanic voters, many of whom had been able to achieve power under Lindsay's community control programs.

Dr. Aronowitz opined that the victory of Abraham Beame in the 1973 Democratic primary mentioned above, was the start of a more fiscally-

conservative, less minority oriented, coalition dominated by real estate interests, which, he says, has continued to date. (Tr. 401).

After providing a historical background, Dr. Aronowitz described his study of the patterns of votes cast by different identifiable groups within the City. His method of discerning patterns, unlike that used in Dr. Engstrom's study, was a sampling technique whereby he chose samples of assembly districts having a predominantly white population and districts having predominantly Black or Hispanic populations, comparing the racial composition of sampled Assembly Districts with the election returns for those districts in three mayoral primary elections. In order to determine racial composition of an Assembly District, the witness used a report by the New York State Legislative Advisory Task Force on

Reapportionment, which report analyzed the 1980 U.S. Census figures together with the City districting maps in use during 1982 and 1984. (PX 3(b) and (c)). He studied the election returns available from the Board of Elections to study the 1981 primary, and relied upon the election returns published in the New York Times following the informal count, for elections in 1973 and 1977 (Tr. 496-99). Thus the population break-down was not for precisely the same years as the elections, and this study cannot be considered scientifically exact by any means. However, there were no large-scale relocations of any particular neighborhoods during these years, and Dr. Aronowitz based part of his observations and conclusions on personal experience. His opinions are entitled to some weight, since he has been both a student and a lecturer on the topic of New York's

changing political scene for many years. He has been a Democratic Party activist, the campaign manager for Mark Lane in 1962 and Martin Berger in 1964, and the founder and leader of certain local Democratic Clubs in the City. However, his testimony lacks the significance of an empirally based statistical analysis.

Relying upon his sample of various Assembly Districts in New York City, Dr. Aronowitz concluded that racial and ethnic issues have come to play a significant, if not dominant, role in the past three mayoral elections and that the tendency for New York City Democrats to vote in racial blocs in [sic] clearly demonstrated by the past three mayoral primaries.

In the 1973 run-off primary election, this witness concluded that white voters voted along racial lines regardless of the ideological preference

they had displayed in the initial 1973 primary:

> "It did not matter that Beame was a traditional liberal, although not a reformer. The conservative vote that had united around [Mario] Biaggi transferred its loyalty to [Beame] because he was the white consensus candidate in a time when minorities were making a bid for independent political power, independent in the sense that they were prepared to run their own candidates." (PX 9 at 13-14).

The witness testified that racial bloc voting continued to appear in the 1977 and 1981 primaries for Mayor, evidenced by the Black districts voting for Mr. Sutton, the Hispanic districts voting for Mr. Badillo, and the failure of either of them to garner significant support in any of the White districts. For example, in each of the four Queens districts sampled, all four of the candidates other than Mr. Sutton and Mr. Badillo received "four digit" votes--the lowest being the 1401 votes cast for Ms. Abzug in the 31st Assembly District. In

contrast, neither Mr. Badillo nor Mr. Sutton received even close to 1,000 votes in any of these four districts. (PX 9).

Dr. Aronowitz' explanation of the reason behind racial bloc voting is essentially the same as other of plaintiffs' witnesses. Racial bloc voting occurred concurrently with an increase in community racial tensions; it increased when New York City suffered a fiscal crisis which was perceived, incorrectly, to have been caused by the expansive redistributive policies of the Lindsay administration. (Tr. 438). Also racial bloc voting increased as the regular Democratic organization lost control over voting behavior, so that it could no longer present a slate or balanced ticket with an appeal to all groups.

Testifying as defendants' expert was Dr. Esther Fuchs, Professor of Political

Science at Barnard College of Columbia University. Dr. Fuchs' opinion on the run-off statute is that "the run-off statute does not discriminate against minorities in New York City, nor does it prevent them from equal access to voting and the nominating processes." (Tr. 628). Her report (DX 4) concludes that coalitions which cross racial and ethnic divisions have remained a standard feature of New York City politics, and that substantial "cross-over voting" has occurred in City elections where Black or Hispanic candidates opposed White candidates. As examples of this phenomenon, Dr. Fuchs points to the success of Blacks who have been elected Manhattan Borough Presidents, to Mr. Badillo's success, and to the minority candidates who have won elections as state court judges and Assembly members. This is correct; however, Dr. Fuchs'

report does not differentiate between the three citywide offices regulated by §6-162 and other elective offices in the State and City. We are persuaded by plaintiffs' evidence that voting for Mayor of the City of New York carries a different weight. Voters understandably perceive the office of Mayor as more visible and authoritative than the offices listed by Dr. Fuchs as illustrations of minority officials who received votes from White voters. If White voters are reluctant to "cross-over" and vote for a minority candidate for Mayor, as the 1973 run-off election returns suggest, then §6-162 enhances this tendency by increasing the effectiveness of negative racial campaign tactics during a short run-off campaign period.

Dr. Fuchs also testified that Black voters frequently have voted for White

candidates, as evidenced by the Black vote for John Lindsay in 1969, for Edward Koch in the 1977 Mayoral run-off, for Mario Cuomo in 1982 (Governor), and for Elizabeth Hotzman [sic] in 1982 (Brooklyn District Attorney). While accurate, this testimony appears somewhat off the mark since the issue at trial was whether Black and Hispanic voters voting under the regulation of §6-162 have less opportunity than other members of the electorate to participate in the nominating process and elect candidates of their choice. Once the 1977 run-off was set between two White candidates, it is of little consequence here that Black voters chose to vote for Mr. Koch. The question is whether §6-162 decreased significantly the chance that a Black or Hispanic candidate could even advance to the run-off, and if such a candidate did advance, whether he or she could win a

run-off election following a condensed campaign dependent upon media promotion.

Dr. Fuchs agreed with plaintiffs' experts that Blacks and Hispanics vote and register to vote at lower levels than Whites (DX 4 at 9), although Black and Hispanic enrollment, primarily within the Democratic Party, has grown during the past ten years. (Tr. 660-62). Dr. Fuchs testified that the legitimate rationale for the run-off statute is that the number and complexity of interest groups in the City, combined with the deterioration of the Democratic Party organization, make it difficult to nominate a candidate who is most representative of the majority of the population.

From her study of New York City elections over the past twenty years, Dr. Fuchs concluded that racial bloc voting does not occur in any identifiable trend.

However, she also testified that if racial bloc voting existed, the run-off statute would benefit the group having a population of 50% or more. (Tr. 712-14). See infra pp. 65, 70-72.

Voting Rights Act Claim

Congress enacted the Voting Rights Act, 42 U.S.C. §1971 et seq. in 1965 and revised it by amendment in 1976 and 1982. Section 2 of the Act creates a private right of action for citizens to challenge discriminatory voting practices. Significantly, the 1982 amendments revised Section 2 following vigorous Congressional debate concerning the standard of proof applicable to a voting discrimination case such as the one plaintiffs here have presented.

Originally, Section 2 stated in full that:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or

abridge the right of any citizen of the United States to vote on account of race or color. . . ." 42 U.S.C. §1973.

Section 2 as amended provides that:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subdivision (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population." Voting Rights Act

Amendment of 1982. Pub. L. No. 97-205, §3, 96 Stat. 131, 134 (codified at 42 U.S.C.A. §1973 (West Supp. 1985).

The reason for the controversy surrounding the 1982 amendments is that in Mobile v. Bolden, 446 U.S. 55 (1980), a plurality of the Supreme Court held that proof of a discriminatory purpose is required to establish both a statutory violation of Section 2 and a constitutional violation of the Fourteenth and Fifteenth Amendments. Id. at 60-74. Before Mobile v. Bolden, the Supreme Court had suggested that proof of a constitutional violation could succeed upon a showing that a voting procedure or practice operated so as to "minimize or cancel out" minority voting strength. Fortson v. Dorsey, 379 U.S. 433, 439 (1965). A significant group of pre-Bolden decisions focused on the "invidious result" of an election scheme, or proof that the "effect" of the

election practice was to deprive minority voters of equal access to the political process. White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Foretson v. Dorsey, supra; Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds, 424 U.S. 636 (1975). Likewise, the few pre-Bolden decisions interpreting the Voting Rights Act standard of proof found that Section 2 reached voting practices which are discriminatory in effect, without requiring proof of discriminatory purpose. E.g., Nevett v. Sides, 571 F.2d 209, 237-38 (5th Cir. 1978) (Wisdom, concurring); Toney v. White, 476 F.2d 203 (5th Cir.), modified and aff'd, 488 F.2d 310 (5th Cir. 1973) (en banc).

With Bolden, a sharply divided Supreme Court rejected the "effects" test and dramatically altered the legal

standard for proving a case premised on the theory of unlawful dilution of minority voting strength. See generally, McKenzie and Krauss, Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment, 19 Harvard Civ. Rights & Civ. Liberties L. Rev. 155 (1984); Parker, The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va. L. Rev. 715 (1983). Justice Stewart, writing for four members of the Court, equated the language of Section 2 with the language of the Fifteenth Amendment, which, in his view, incorporated a discriminatory purpose element of proof. The stringency of this new legal standard soon became apparent in cases where lower courts rejected challenges to at-large voting systems, because of insufficient evidence of discriminatory intent. See Parker,, 69 Va. L. Rev. at 736 n. 108 and cases

cited therein. According to one commentator, the consequence of Bolden was that "[d]ilution cases came to a virtual standstill; existing cases were overturned and dismissed, while plans for new cases were abandoned." Derfner, Vote Dilution and the Voting Rights Act Amendments of 1982, MINORITY VOTE DILUTION (C. Davidson ed. 1984).

By a coincidence of timing, the Voting Rights Act came up for renewal shortly after the Bolden decision. Thus Congress accepted a fortuitous opportunity to overturn Bolden, and, in 1982 adopted a "results" test as the legal standard applicable to a challenge under Section 2 of the Voting Rights Act.

If ever there were an instance when Congress anticipated judicial inquiry into legislative intent and decided to supply it, this is the instance. The Senate Report, reprinted at 1982 U.S.

Code Cong. & Admin. News 177, states that "the proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in Bolden. In pre-Bolden cases plaintiffs could prevail by showing that a challenged election law or procedure, in the context of the total circumstances of the local electoral process, had the result of denying a racial or language minority an equal chance to participate in the electoral process." Id. at 192-93. "The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation." Id. at 205.

This passage is only a small sample of the Report's extensive discussion of

the relative merits of a "results" test as compared to a discriminatory purpose test. Opposition to the "results" standard was satisfied by the incorporation of the so-called "Dole compromise" which responded to fears that a litigant would be able to prove a Section 2 violation simply by showing an absence of proportional representation by minorities. That compromise is set forth in the latter portion of Section 2(b):

> "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

In addition to setting forth a clear statement as to the standard of proof in a Section 2 case, the legislative history provides a list of "typical factors" which could supply probative evidence of a Section 2 violation. These factors

are:

"1. the extent of any history of official discrimination in the state of political subdivision that touched the right of the members of the minority group to register, vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provision, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction."

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." 1982 U.S. Code Cong. & Admin. News, 206-07.

In considering the relevance of these "typical factors" to the case at bar, we are mindful of the fact that the statute itself directs the Court to consider the "totality of circumstances," and that the factors listed in the Senate Report are merely guidelines that may prove useful in the appropriate factual context. However, we also note that the

factors listed by the Senate Report are drawn directly from the analytical framework of White v. Regester, the decision which supplied the statutory language enacted in the 1982 amendment of Section 2. Congress adopted the following language from White:

> "The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765-66 (citations omitted).

Therefore, we believe that the list of factors relied upon in White also is entitled to significant consideration. We now consider the foregoing factors.

1. Past Discrimination

Proof pertaining to this factor consisted primarily of plaintiffs' request that the Court take judicial

notice of findings in prior cases on the subject of racial and ethnic discrimination in New York State. Contrary to the popularly held belief that racial discrimination only takes place within the Fifth and Eleventh Circuits, plaintiffs' exhibits 1, 12a, 12b, 12c, and 15 through 25 support the finding that Black and Hispanic voters in New York City have been the subject of various procedures and/or statutes in the recent past which have had the effect of abridging their voting rights.

Black citizens of New York were not eligible to vote on the same terms as White citizens until 1874 when the New York State Constitution was amended, following the ratification of the Fifteenth Amendment.

In 1921, Article II, §1 of the New York State Constitution was amended to provide that "no person shall become

entitled to vote. . . unless such person is also able . . . to read and write English." Forty-five years later, the United States Supreme Court ruled that this provision violated 42 U.S.C. §1973b(e), and was void. Katzenbach v. Morgan, 384 U.S. 641 (1966).

Following the Katzenbach decision, election officials in the counties of Bronx, Kings and in New York County continued to employ a literacy test.[5] United Jewish Organizations of Williamsburgh v. Wilson, 510 F.2d 512, 515 (2d Cir. 1975), aff'd, 430 U.S. 144; Torres v. Sachs, 381 F.Supp. 309 (S.D.N.Y. 1974); New York v. United

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[5]Since the proof at trial shows that elections are now fought, won and lost in the media, rather than by the word of mouth campaigning of the past, literacy should seem to be a reasonable condition for exercise of the franchise. However, the Supreme Court has held otherwise.

States, 65 F.R.D. 10 (D.D.C. 1974); see also, New York v. United States, 419 U.S. 888 (1974), affirming district court order directing the State of New York on behalf of Bronx, Kings and New York Counties to comply with the filing requirements of 42 U.S.C. §1973(c). Judge Stewart of this Court found that the City of New York had conducted elections in English only, and that this practice, among others, deprived Hispanic voters of their statutory rights under the Voting Rights Act of 1965. Torres, 381 F.Supp. at 313.

The relatively recent employment of an English literacy test in New York City is evidence of past discrimination against Hispanic class members, and to some extent Black class members, which discrimination has had an adverse impact on the ability of Black and Hispanic voters to participate effectively in the

nominating process, see Rogers v. Lodge, 458 U.S. 613, 624 (1982) (approving district court's conclusion that a literacy test was one means by which Blacks had been denied access to the political process). On all the facts before this Court, plaintiffs have carried the burden of showing the existence of past discrimination. When this evidence is considered together with the fact that the 1982 Census reports 64.5% of Whites in New York City as registered voters, compared to only 53.1% of the Blacks sampled, and only 42.9% of Hispanic respondents (PX 8), we cannot say that past discrimination has no impact on the continued depressed rate of voter participation by members of the plaintiff class. On the contrary, historical evidence of past inequality when combined with evidence of lower socio-economic status and lower rates of

voter registration, supports a finding that a plaintiff class member has less opportunity to nominate and elect a candidate of choice under a statute which requires a superplurality in the initial primary election (40%), or the burdens associated with running two primary campaigns.

2. Racial Appeals in Campaigning

As to this sixth factor listed in the Senate Report, the evidence overwhelmingly supports a finding that the 1973 run-off campaign featured negative, racially slanted campaign tactics, tactics which surfaced only following the initial primary and which carry enhanced effects during the two week run-off period. As discussed above, campaign literature was distributed containing overt and subtle appeals to racial prejudice. Two of these exhibits featured statements such as "Save New

York City" or "Last Chance to Save New York City." As Mr. Badillo asked during trial examination, the obvious question is "Save New York City from what?"

> "This is not just an appeal to vote the one fellow against the other. This is put on the basis of saving the City of New York. Saving it from what? Saving it from whom? Saving it from Hispanics and Blacks. That was the message that was used." (Tr. 99).

According to plaintiffs' tally, the racial appeals worked successfully to defeat Mr. Badillo's nomination, by causing a large turnout of White voters who had not participated in the initial primary, but were affected by last minute appeals to vote against the minority candidate:

> "It frightened the white community into coming out to vote in huge numbers for the June 26th [1973] primary, which they did, and that's the reason Abe Beame won by 61% to 39%." (Tr. 118).

> "[T]he newspapers were all astonished, nobody expected to have over 900,000 people coming out to vote in a New York City Democratic

> [run-off] primary. The total vote over 900,000 was a total shock to me, to all the experts who had not predicted that kind of turnout . . . which has not been equaled since then." (Tr. 125-26).

The testimony and the documentary evidence persuade us that racial appeals were made; and, moreover, that they were made possible or gained strength due to the existence of the short run-off period.

3. Racially Polarized Voting

A preponderance of the credible evidence satisfies this Court that, in citywide elections, voting patterns have been racially polarized to an extent made significant by the Voting Rights Act and its purpose. Defendants' expert pointed out that the data could not reveal the motives of any voter (Tr. 728-29), and we agree. However, for purposes of establishing a §2 violation, it is significant if the evidence demonstrate bloc voting by one group or race for or

against a minority candidate. In a vote dilution case such as this one, what is being challenged is the damper on effective participation by minorities in the population; and the pertinent case law recognizes that majority vote requirements, such as §6-162, when combined with racial bloc voting, can result in diminished minority voting strength. See City of Rome v. United States, 446 U.S. 156, 183-84 (1980) (disapproving election law change from plurality-win to majority vote/run-off system where Black candidate who won initial primary would still have to face runner-up White candidate in a racial bloc voting context); Zimmer v. McKeithen, 485 F.2d at 1305 (noting majority vote requirement is an "enhancing factor").

The evidence in this trial showed that the Black or Hispanic candidate in

past citywide elections was on occasion unable to obtain votes from predominantly White districts, although each received larger than majority support of the districts where there resided minority voters of the same race or ethnic background of the candidate. The evidence further demonstrated that in the one election year where a minority candidate appeared on the run-off slate, he lost overwhelmingly to a White candidate in an election unusual for its high voter turnout rate, and he received very few votes from those White democrats who were ideologically linked, as far as this can be determined by district, to his platform.

In the regression analysis applied to the 1977 election by Dr. Engstrom, the regression coefficients, or the estimate of how strongly the two variables (racial composition and votes cast for a

particular candidate) are related, exceeded the level at which chance could be an explanation for the coincidence of the voter's and the candidate's racial characteristics. The regression coefficient, assigned the value "b" as representing this relationship, is set forth in columns B and D on the chart below. In each election analyzed, the regression coefficient evidences racially polarized voting patterns. Dr. Engstrom testified that any time the regression coefficient exceeds .5, there is no question but that racially polarized voting has occurred. "It means that at a minimum a majority of one group is voting against a majority of the other group." (Tr. 256). This appears to conform to the conclusions of experts in similar cases claiming a §2 violation. E.g., Gingles v. Edminsten, 590 F.Supp. 345, 368, n. 30 (E.D.N.C. 1984).

Table 1: Results of Analysis Based on Population Percentages Within Assembly Districts

Minority Candidates	A Intercept for Other Voters %	B b for Hispanic Population (Relationship)	C Intercept for Hispanic Voters %	D b for Black Population (Relationship)	E Intercept for Black Voters %	F R2
1977 [Mayor]						
Badillo[Hispanic]	-3.4	.709 (.056)	67.5	.067 (.033)	3.3	.746
Sutton[Black]	-2.2	.015 (.052)	-0.7	.672 (.030)	65.0	.892
1982 [Lt.Gov.]						
McCall [Black]	23.8	.363 (.103)	60.1	.579 (.053)	81.7	.727
1984 [President]						
Jackson [Black]	4.2	.271 (.046)	31.3	.893 (.024)	93.5	.965

(PX 7)

As shown in column E, in all three elections Black voters voted overwhelmingly for Black candidates. For example, Mr. Sutton is estimated to have received 65% of the Black vote in 1977; Mr. McCall 81.7% in 1982; and the Rev. Jackson 93.5% in 1984. Black candidates fared less successfully with the Hispanic voters, who chose Walter Mondale over the Rev. Jackson in 1984 by 50.4% to 31.3%, (PX 7 at 12), although Mr. Badillo clearly won the Hispanic vote, 67.5% in 1977.

Obviously if the Black and Hispanic members of the plaintiff class were to combine as one coalition, they could elect a fusion candidate, but this had not heretofore been achieved in New York City, and is unlikely notwithstanding the tendency of the literature to lump them together as if they were a single bloc. See Tr. 552, 636, 639.

The evidence of polarization is revealed when column A, the "other voters" is compared to columns C and E. The "other voters," including Whites, demonstrated no significant support for either minority candidate in 1977 and only one quarter of their vote for Mr. McCall in the 1982 Lieutenant Governor primary election. The tendency for the vote to vary, depending on the type of voter residing in an Assembly district, is reflected in column F, ranging from 72.7% to 96.5%.

Dr. Aronowitz' testimony corroborated the opinion expressed by both Mr. Badillo and Dr. Engstrom. Dr. Aronowitz testified that the racial and ethnic breakdown of the vote in the 1973 run-off primary election shows that 80% of the Italian and Irish neighborhoods supported Mr. Beame, and 18% supported Mr. Badillo. Similarly, 76% of the

voters in districts having a predominantly Jewish population supported Mr. Beame while 24% supported Mr. Badillo. Black voters gave Mr. Badillo 62% of their vote and Mr. Beame 38%, while over 90% of the Hispanic voters voted for Mr. Badillo. (PX 14(j)). According to Dr. Aronowitz, the votes cast in the run-off were decidedly along racial rather than ideological lines because Mr. Beame picked up all ten of the Assembly District which had supported Mr. Biaggi, "a social conservative," in the initial primary, even though Mr. Beame ran on a traditional liberal platform. Dr. Aronowitz accounted for the fact that the more liberal Beame won the more conservative Biaggi districts because Mr. Beame was a White candidate running against a Hispanic candidate. (Tr. 421). This analysis appears to the Court to be correct.

We do not say, nor need we find, that racial bloc voting is total in New York City--it is not. In specific areas such as Congressional districts, White candidates, usually incumbents with a broad based appeal, have defeated Black and Hispanic opponents in instances of primary contest where minority voters were a majority. Further, it is of no consequence to the enforcement of the Voting Rights Act as to who caused the polarization. The exhibits show that polarization is less insofar as concerns Hispanic candidates and voters, and some of the polarization or bloc voting insofar as Black voters and candidates are concerned appears to stem from recent outrageous public utterances by certain Black political leaders which has inflamed both White and Black voters, e.g., Rev. Jackson and Rev. Farakhan. It is sufficient for our present analysis to

find that racial and ethnic polarization and bloc voting exists in New York City to a significant degree, and I so find.

4. The Extent to Which Minority Candidates Have Held Elective Offices

In elections for offices other than citywide offices, Blacks have been able to win White as well as Black votes. For example, in 1965 Constance Baker Motley won 87% of the total vote in a contested primary with a White candidate for the Democratic nomination as Manhattan Borough President; in 1969 Percy Sutton won 81% of the votes in such a primary for the same office; and there are other examples. See Appendix A to Defendants' Proposed Findings of Fact and Conclusions of Law, filed June 20, 1985. Blacks or Hispanics currently serve as representatives of 18 Assembly districts; New York has three Blacks and one Hispanic in the United States Congress; four Blacks and two Hispanics are New

York State Senators; four Blacks and three Hispanics are members of the City Council; and there are 29 Black elected judges in New York City. (Tr. 642-43). Despite this relative success in electing minority candidates to some offices, no Black or Hispanic candidate has been elected Mayor, Comptroller, or City Council President.

5. Tenuous State Policy

In light of our finding, discussed below, that N.Y. Election Law §6-162 violates the Fourteenth Amendment because it was designed with a discriminatory purpose, we also conclude that the state policy underlying §6-162 is tenuous within the meaning of that term in the Senate Report on the Voting Rights Act amendments of 1982. The run-off primary was a marked departure from the traditional procedure used to select Party nominees. The statute applies to

only one City, and in that one City to only three offices, and only to a priary, not a general election. The enactment of §6-162 followed immediately upon an unprecedented showing by a Hispanic candidate for Mayor, and according to its legislative history, the state policy was, at least in part, aimed at preventing minority voters from gaining political power and/or preserving the status quo within the Democratic Party (Tr. 445, 668), neither of which is a legitimate state concern. See Republican Party v. Tashjian, 599 F.Supp. 1228, 1239 (D. Conn. 1984)(state's interest in fostering an informed electorate does not authorize state "to guage, [sic] much less determine, whether candidates for public office adequately reflect the views of their parties."), aff'd __ F.2d __ (2d Cir. Aug.__, 1985).

As to the final factor made relevant by the evidence at trial, the extent to which plaintiff class members bear the effects of discrimination in areas such as education, employment and health, testimony by plaintiffs' expert witness, Dr. O'Hare, as well as other testimony and statistical evidence demonstrated to the satisfaction of this Court that Black and Hispanic voters are largely concentrated in lower income groups and that they complete fewer years of schooling than do whites in New York City. Whether this "hinder[s] their ability to participate effectively in the political process" (Senate Report, supra) is necessarily a speculative inquiry. Nevertheless, the facts show that poorer and less educated persons of voting age tend to register to vote and vote at low rates. The parties are not in dispute as to this specific fact. (See DX 11, Tr.

353). Thus, the burdens associated with campaigning and winning in two primaries instead of one are likely to have a disproportionately unfair impact on minority voters who, for some reason, already participate at lower rates than White eligible voters.

Based upon the totality of circumstances, plaintiffs have proved that §6-162 violates Section 2 of the Voting Rights Act. We have conducted our analysis according to the suggested factors which aid in distinguishing between merely "losing the contest" and being deprived of political access and effective participation. There has been a failure of proof as to those other items listed as "typical factors" in the legislative history and not specifically considered. As already mentioned, nothing in this Court's decision is based upon the idea that minority voters are

entitled to proportional representation in public office.

Constitutional Claims

Plaintiffs' amended complaint alleges that §6-162 violates the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Based on the evidence at trial, we find that there has been no denial of rights guaranteed to plaintiffs under the First or Thirteenth Amendments. However, in view of the evidence of discriminatory intent by the New York Legislature, and the thinly veiled purpose of the "anti-Badillo" law, we agree that plaintiffs have been deprived of the right to equal protection by the Fourteenth Amendment, in that §6-162 was conceived as a purposeful device to further racial or ethnic discrimination and the statute had the result of diluting minority voting strength.

A constitutional challenge to §6-162 based upon equal protection has been decided once by a New York State Court. In 1973 Mario Procaccino challenged the newly enacted statute, then N.Y. Election Law §131-a, claiming that it violated both the Fourteenth Amendment's guarantees of due process and equal protection and the Home Rule provision of the New York State Constitution, Article IX, §2(b). Procaccino v. Board of Education, 73 Misc.2d 462, 341 N.Y.S.2d 810 (Sup. Ct. N.Y. Co. 1973).

The New York court discussed in detail the origins and purposes of New York's home rule law which, briefly, is designed to prevent undue legislative intrusion into local, municipal affairs. There was no Home Rule request before the enactment of the run-off primary statute. Nevertheless, the court in Procaccino upheld the statute, relying in part on

the presumption of constitutionality attached to any legislative enactment. 341 N.Y.S.2d at 815. That court also found that the run-off statute clearly relates to a matter of state concern, and that the run-off procedure is part of the election process, a process traditionally regulated by the state legislature. Essentially, the court viewed the run-off statute as one of those matters of both state and local concern which are inseparably bound together. Id. at 816. Under the controlling authority of Adler v. Deegan, 251 N.Y. 467 (1929), such matters of state concern may be dealt with by the Legislature without the necessity of a Home Rule request. Id. at 814.

In ruling on plaintiffs' federal equal protection claim, the court in Procaccino built upon its reasoning supporting a finding that no Home Rule

request was needed to conclude a fortiori that if the Home Rule provision does not prevent the enactment, then it cannot be found that the difference in application of the election law to different cities violates the Equal Protection Clause.

> "It has already been demonstrated herein that this enactment is a matter of state concern, is not arbitrary simply because it affects only New York City and has a rational basis, to wit, the implementation of 'effective local self-government.'" To uphold plaintiff's contention that Election Law §131-a violates the Equal Protection clause solely because it applies to New York City and not to all of New York State, would, as a logical consequence, render the home rule concept illusory. . . . Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably--reasonably being measured in terms of a proper legislative purpose." Id. at 819 (citations omitted).

Thus, having found that the run-off statute has a legitimate purpose, ("This enactment, it is hoped, will affirmatively implement the reality of

representative government by reflecting a more valid consensus of the party members."), the Court itself found no violation of the constitutional right to equal protection or the right to vote.

Similarly, the New York court found that the run-off statute is a "rational process" and as such does not violate the right to due process, a right held by Mr. Procaccino in his capacity as a voter and as a candidate. The rational basis or legitimate purpose of the run-off law is "adjustment of the primary election process to better reflect the will of a majority of sizable plurality of voters." Id. at 816.

The United States Supreme court has decided five major cases concerning the extent to which popular support type requirements may constitutionally be placed upon ballot access in the face of an equal protection challenge. Anderson

v. Celebrezze, 460 U.S. 780 (1983) (invalidating early filing deadline); Illinois Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (invalidating disparate signature requirements for city and state nominating petitions); Lubin v. Panish, 415 U.S. 709 (1974) (invalidating candidate filing fee); Jenness v. Fortsom, 403 U.S. 431 (1971) (upholding signature requirement of 5% of votes cast in previous election for independent candidates to be placed on ballot); Williams v. Rhodes, 393 U.S. 23 (1968) (invalidating signature requirement of 15% of votes cast in previous election). However, in all of these cases, except Lubin, the statute challenged affected a newly formed or minor party or independent candidate. In the present case, plaintiffs are not part of an identifiable political organization such

as the American Independent Party, the group whose candidate was blocked from the presidential ballot in Williams, nor are they situated as was John Anderson, an independent presidential candidate who was denied ballot access by the Ohio statute in Celebrezze, supra.

This situation is also unlike the one considered by the Supreme Court in Illinois Board of Elections, where Illinois law required independent candidates and new political parties to obtain more nominating signatures in elections for Chicago city offices than for statewide offices. There the disparate treatment was a clear restriction on the ability of the Socialist Workers Party to place a candidate on the city ballot. New York Election Law §6-162 does not operate as such an obvious restriction on access to the ballot.

Section 6-162 on its face applies equally to all voters in New York City. It does not allocate unevenly the right to vote between White enrolled party members and Black or Hispanic enrolled party members. Nor have plaintiffs really alleged a deprivation due to treatment which differs between New York City and, for example, Buffalo, Rochester, or Yonkers. Under general equal protection principles, articulated in the cases cited above, we would not find §6-162 unconstitutonal. However, this case is more specifically defined; this is a minority vote dilution case. Essentially plaintiffs' argument on constitutional equal protection grounds is the same as on their statutory claim--that Black and Hispanic voters in New York City are less able to participate in the nominating process than White voters in New York City.

Under the most recently stated standards set by the U.S. Supreme Court, this argument can succeed as a constitutional equal protection claim if it is supported by adequate evidence that the invidious results of §6-162, discussed above in our treatment of plaintiffs' statutory claim, can be traced to a racially discriminatory purpose. Rogers v. Lodge, 446 U.S. 613, 617 (1982); Bolden, 446 U.S. at 66. Such evidence is amply supplied by the legislative history of the run-off primary law.

Legislative History

With the experience of the 1969 Procaccino debacle fresh in the minds of the Democratic party organization, the New York City Run-off Primary Law was first introduced in the legislature late in the regular session of 1972. At that time John V. Lindsay, first elected as a Republican, was Mayor of New York, and a

new mayorality [sic] election was scheduled to occur in the following year. Assemblymen Steingut and Blumenthal sponsored the act in the Assembly. Both were members of the regular party organization of the Democratic Party in New York City. We have mentioned above, the activities of Assemblyman Steingut as the claimed inventor of the Stanleymobile. Apparently, there was no companion bill in the Senate but Senator Bloom, also of New York, spoke for the bill in the debate in the Senate.

The bill jacket speaks volumes, both for what it says and what it does not say. The legislation moved with alacrity. Originally introduced March 7, 1972 and amended April 4th, it passed the Assembly at its third reading on April 14th, and it passed the Senate on April 25th. On May 8th it was sent to Governor Rockefeller, a Republican, who approved

it on June 8th as Chapter 877 of the Laws of 1972.

The Honorable John P. Lomenzo, a Republican, and then Secretary of State wrote to the Counsel to the Governor under date of May 1, 1972, urging a veto. His prescient comments are of interest:

> "1. This measure presents grave constitutional questions.
>
> a. Out of the multiplicity of elective offices for which a primary election is held in New York City, only the aforementioned three offices are created a class for which a second election to choose party candidates may be held.
>
> No reason for such special treatment is apparent nor does the measure advance any basis therefor.
>
> b. None of the primary candidates for mayor, city council head and city comptroller, however, denominated, of the other cities of this State are accorded such special treatment either.
>
> Similarly, no rationale therefore is shown.
>
> c. In no other primary contest for any office in the State is there a requirement that a candidate, to be successful, must garner not less than 40% of the votes cast.

> Again, no justification for such classification is presented." (PX 1).

Mayor Lindsay wrote his friend Nelson Rockefeller under date of May 18, 1982 suggesting that "while I support the concept of a run-off primary, a substantial and unnecessary expenditure would be required of city funds." In addition the mayor raised other technical or logistic objections to the bill.

The Board of Elections also wrote to the Governor's Counsel objecting to the cost and logistic burdens. The letter of William F. Larkin, President of the New York City Board of Elections dated April 28, 1972 closes with the following comment:

> "It is respectfully submitted that this Bill, standing alone without any other accommodating amendments being made to the Election Law, is absolutely ridiculous."

The Citizens Union of the City of New York, a public interest group,

advised the Governor that it supported the Bill as did the Association of the Bar of the City of New York. The County Officers Association of the State of New York, consisting of county officials from only those counties outside of the City of New York, advised the Governor:

> "The County Officer's Association does not want to interfere with the election process in the city but it is opposed to the principle established by this Bill. Elections of the one receiving the largest vote even though it may be only a small plurality has been the procedure and has worked for a long period of time. A change would not only seem to be unncessary but would be expensive. For example, this Bill would cost the County of Monroe an additional $100,000 a year and all other counties outside the city a comparable amount. The County Officer's Association opposes the principle of this Bill.

Of course the Bill had specifically been drawn so as to exclude any reference to any upstate municipality or election district.

When the Bill came to the state Senate a transcript was made of the

debate on the floor on April 23, 1972. This discussion is highly illuminating. It is apparent from the start that the Republican leadership in the Senate took the position that the Bill was solely a matter affecting the internal affairs of the City of New York, ("Home Rule"). This notwithstanding the fact that no Home Rule request had been received from the legislative body of that city, as ordinary would be thought to be required under the New York Constitution, Article IX, §2(b), discussed earlier.

Senator Brydges of Niagra County, New York, was then the Republican Majority Leader. Senator Brydges stated that he favored the measure. His attitude is measured by his comment on the floor:

> "[W]hen I view New York City when I visit it. . . I am wondering whether it could be governed by either political party or by anybody of any race, color or creed. . . . Maybe [the political processes in the

> city] aren't going to work. They certainly aren't working now."

Various minority members of the Senate nailed this measure in debate, and eloquently. The resistance began with Senator Galiber of the Bronx, a Black Democrat:

> "What we are talking about in this bill is vitiating. Vitiating the possibility of a minority [member] winning an election. And we are doing it again, because what we are saying is, we don't want, and I say it in all due respect, what about the Procaccino situation, and everybody jumps. It reminds me of the guy in the South who is against integration and says, well maybe I'll go that route. Would you want your daughter married to a Black man? He said no, I wouldn't want that. That is what we are doing. We are reacting here. This is a bad bill. Under this bill we are under the guise of liberalism, under the guise of democracy, a minority [member] could not win in the next 50 or 60 years in the City of New York, notwithstanding the fact that it represents a large portion. My liberal friends say to me as they pick those liberal credentials up, this represents reform. [If] this bill is passed there is not a slight possibility that a minority. . ." [debate cut off--bill laid over] (DX 23).

Later, when debate was resumed, Senator Galiber charged the sponsors with "camouflage" as to their true motives. He said:

> "What's really in issue is the fact that if this bill is passed, that . . . as the trends are going and as people move to suburbia. . . that precludes the possibility [of] someone from the minority being elected . . . . What I am primarily concerned with is the fact that when we split this vote, when we have five or six persons who are running that it [the bill] precludes the possibility of a minority man winning, and all of you know it as well as I do. . . . if the Republican Party ever wanted to singly destroy the Democratic party, this is the bill. Interesting enough as usual, we are destroying ourselves in the guise of democracy . . . its a bad bill."

Later, in the debate, Senator Stewart, also a Black Democrat, took the floor. He said:

> "[I]t's really amusing. The more we learn we are told by the majority forces that all you have to do is behave yourself, and learn the process. You say blacks are powerless, and then you say--well the reason why blacks are powerless is you don't learn the rules of the games and you don't apply. So here

we get to 1971-73 and blacks are beginning to learn the process in the City of New York, and I am tending to become more in tune with its youth, who say that this system will never work. It is so prone to oppress him, that if we ever learn one game, they are going to change the rules of the games. We have accepted the process as is, in the City of new York, it's real funny. Last month we announced in the City of New York that we are going to run one black man for citywide office next year. Notice we didn't say which one. We didn't say it was for mayor or city council president or comptroller. We said we are going to run one black man for citywide office next year. We are learning the game well, not two black men, not three black men, not black men for all offices, we are going to run one black man for citywide office next year. We learned the game even better than that--we said that we are going to hold a black primary in October of this year--we are going to hold a black primary so that we end up with one black man that all black people in the City of New York can support for some citywide office. Not necessarily for mayor, not necessarily for city council prisdent, nor not necessarily for comptroller. We learned about balanced tickets--we learned that from the majority people, they used to have [a situation] where you had to have a [balanced ticket]. . . .

* * *

Again, but being very serious, I find it very tragic that now black people in the City of New York have learned the rules of the game, now that we have spent all of last year, all of this year, and plan to spend the rest of this year registering black people to vote in the City of New York, you are going to change the rule of the game.

* * *

There are at least five non-black, non-Puerto Rican, candidates running for mayor in the City of New York next year. Now that this is very possible, that with 30% combined black and Puerto Rican votes, we may nominate a black and Puerto Rican in this Democratic primary with five others splitting the vote. We come up with a bill saying that unless you get 40% of the vote, this figure that you pick is diabolic. . . Why didn't you say 30% of the vote? You know--when 30% of the city is Black and Puerto Rican, why don't you give us a 50-50 chance and say 30% of the vote. No you pick 40% which effectively precludes the Black and Puerto Rican coalition from nominating in a Democratic primary a candidate for mayor. And then you tell me, you give me two weeks, you say, O.K., the black and Puerto Rican candidate come in second, and you give me two weeks to reverse all of those coalitions that up to this date, never put a Black or Puerto Rican on their balanced ticket. You give me two weeks to convince them--something that they haven't done for fifty years--two weeks to

> convince them that they should support the second candidate and have him win over the first candidate with five candidates who will not put any Blacks or Puerto Ricans on their slate. Gentlemen, please don't do this to us because you have turned away our youth already, and as much as you may consider me a radical, my people say that I am conservative. My people say that I believe in this system, and I am fighting to participate in this system, but now that I am ready to participate, you change the rules of the game. I hope that this bill is defeated."

The record contains further discussion to the same effect, including observations about the cost to candidates, and to the City, of the extra run-off primary. But the bill passed the Senate 49 to 8.

The sponsors of the bill did not stand up to its assailants. Senator Bloom asserted that unless it were enacted "individuals would prevail in these primary contests who are not truly representative of the <u>majority</u> of the members of a particular party." (DX 23).

This is another way of saying that, as this Court has concluded, the voting power of the minority would be diluted, for the power of a majority cannot be enhanced without taking away from that of a minority, and that minority might likely be racial or ethnic, rather than of a specific philosophical bent, e.g., liberal or conservative. As polarized voting increases this likelihood becomes greater.

In articulating an evidentiary standard required for a finding of discriminatory intent, Justice Powell explained the circumstances which justify judicial review of legislative action:

> "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of

their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action--whether it 'bears more heavily on one race than another,' Washington v. Davis, supra, at 242--may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). The evidentiary inquiry is then relatively ease. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence [such as historical background].

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members

> of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Nixon, 418 U.S. 683, 705 (1974); 8 J. Wigmore, Evidence §2371 (McNaughton rev. ed. 1961)." Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-68 (1977) (footnotes omitted, emphasis added).

Defendants' expert witness, Dr. Fuchs, conceded that "if we assume that the minority population of New York City is 50% or more in the near future" that it was "definitely possible that the run-off statute would benefit minority candidates" (Tr. 713). This analysis assumes bloc voting, and carries with it the implicit premise that while the minority population remains at or below 40%, the voting rights of the minority are diluted by the statute, as plaintiffs contend.

In a more difficult case than the one presented here we can imagine a real controversy over the means by which a plaintiff must prove that an election law was enacted or maintained for the purpose of racial discrimination. See Jones v. City of Lubbock, 727 F.2d 364, 377-78 (5th Cir. 1984). As Justice Stevens pointed out, a process by which a federal court inquires into the motivations of local officials presents a dangerous potential for intrusion into an area of intensely local and political concern. Rogers v. Lodge, supra at 629 (Stevens, J., dissenting). The evidentiary inquiry is likely to be difficult because admissions of discriminatory intent are rare. However, in the case at bar we need not infer discriminatory intent merely from the circumstantial evidence of discriminatory impact, or from facts such as the absence of a Black or

Hispanic in the Mayor's office. Instead, the legislative history of §6-162, especially use of the "diabolic" 40% figure, supplies ample proof that satisfies the Supreme Court's equal protection test.

Under the most recently articulated standards set by the United States Supreme Court, the foregoing establishes a voting practice or procedure that was enacted with an unconstitutionally discriminatory purpose. In Arlington Heights v Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), the Court rejected the view that a law is invalid under equal protection simply because it may affect a greater proportion of one race than another. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id. at 265. In Bolden, the Court's plurality opinion

applied this rule in a vote dilution context, where an at-large electoral system was challenged. In Rogers v. Lodge, 458 U.S. 624, 627 (another "at-large" election case), the Court followed Bolden and applied a discriminatory intent test, this time allowing for proof of intent to be proved by evidence of objective factors such as past discrimination and a depressed socio-economic status among Black voters.

In an analogous situation presented under §5 of the Voting Rights Act, the Supreme Court agreed with the trial court that an electoral change from plurality--win to majority--win in general municipal elections, when combined with racial bloc voting, a majority White population, and an at-large electoral system, would dilute the voting strength of Black voters in a rural Georgia county. City of Rome v.

United States, 446 U.S. 156, 183-84 (1980). In explaining how the scheme would produce that effect, the findings of the District Court echoed the comments of Senator Stewart in the New York State Senate debate, just quoted:

> "With respect to the majority vote and runoff election provisions, the discriminatory effect is clear beyond peradventure. Under the plurality-win system, a black candidate in Rome would stand a good chance of election if the white citizens split their votes among numerous candidates and the black voters engaged in 'single-shot' voting, i.e., voted only for the candidate or candidates of their choice. Under the majority vote/runoff election scheme, however, the black candidate, even if he gained a plurality of votes in the general election, would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority, the black candidate would be at a severe disadvantage." City of Rome, 472 F.Supp. 221, 244 (D.D.C. 1979) (footnotes omitted).

Turning to the alleged First Amendment violation, we recognize that "[t]he exclusion of candidates [from the

ballot] also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." Anderson v. Celebrezze, 460 U.S. 780, 787-88 (1983). We are also mindful that the Supreme Court has once tied the right of a candidate to a place on the ballot with the association rights of the voters themselves. Lubin v. Parish, 415 U.S. 709 (1974). However, we find no First Amendment violation based upon the record in this case. Both Anderson and Lubin involved state statutes which totally excluded a plaintiff from appearing on a ballot.

In Anderson, Ohio law imposed an early filing deadline which effectively excluded a late-emerging independent Presidential candidate from the Ohio

general election ballot. In Lubin, California law imposed a filing fee on an indigent candidate, leaving no alternative means for him to gain access to the ballot. Both of these statutes made it practically impossible for an identifiable segment of voters or political candidates to appear on the ballot. In neither case was the state able to demonstrate a legitimate justification for the rule.

In contrast, the New York run-off law has not been shown to eliminate completely any candidate from access to the ballot in the general election. Nothing in §6-162 prevents plaintiff class members from nominating an independent candidate to run in the general election against the party nominee, or starting a new party of their own. Plaintiffs' rights to free

association have not been abridged on account of §6-162 as alleged.

Having found for plaintiffs on both the Voting Rights Act claim and the Constitutional claim to Equal Protection, we need not decide the alleged violation of the Fifteenth Amendment, this especially in light of the uncertainty surrounding the standard of proof applicable in a vote dilution case premised upon the Fifteenth Amendment's prohibition upon discriminatory interference with the right to vote. See Rogers v. Lodge, 613 U.S. at 619 n. 6.

Practical Effects

This Court is not unmindful of the problems presented for a political party faced by a primary of the sort experienced in 1969 (five primary candidates) and 1977 (seven primary candidates), which in effect turns out to be a steeplechase race or a cavalry

charge rather than a reasoned choice by the enrolled party members as to its candidate. The Procaccino experience, in which the 33% plurality candidate failed to reflect the mainstream of party support, and was therefore defeated in the general election notwithstanding a significant lead in party enrollment, does invite a remedy. The existing problem was best described by Dr. Fuchs, defendants' expert:

> "New York is the most populous and most complex city in the state, and as it stands now, is still dominated by the Democratic Party. Because of the number of interest groups in the city, the complexity of the population, you want a situation within the party political process to be able to nominate a candidate which is most representative of the majority of that population. And the problem without the runoff is, because of the large number of candidates that we have now usually running in primaries, parties stand to be in a situation of nominating somebody [who] has a very small percentage of support among the party constituents.

THE COURT: Do you have an opinion as to why there are so many people running in the primary?

THE WITNESS: I think--my opinion on that would mostly be that politics is in some sense a game of ego now, and you do not need the support of party organizations to run anymore. And because parties don't control the process, individuals, some of whom have large egos, can get directly involved in the process now and run their own personal campaigns.

It is much easier to run an individual personal campaign now than it was when the party organization dominated the nominating process." (Tr. 707-08).

If, as this Court believes, Professor Fuchs is correct in her view that there is a serious problem of the nature she describes, presented by citywide primaries in which more than three candidates of equal strength are participating, then that problem could be met in ways which would not violate the federal Voting Rights Act or discriminate in practical effect against minorities, as this statute does. It may well be

that a threshold of 30% or less to trigger a run-off would be non-discriminatory; such a conclusion is implicit in the plaintiffs' experts' reports and was recognized by Senator Stewart in the debate preceding adoption of the run-off primary law. (DX 23 at p. 13).

Furthermore, the efforts of those who would mount a big media campaign based on ego, and money, could be attenuated, and the organization of the political parties could be strengthened, if the New York Legislature so desires, by increasing, within reason, the percentage of party enrollment representing the required number of valid signatures to a nominating petition. As matters now stand, in this city of more than seven million people, a person can subject taxpayers to the cost of a contested primary by submitting only

10,000 valid signatures (or 5% of the party enrollment; if less). New York Election Law §6-136(2)(a). Since it is a crime in New York tc pay money to any person for procuring signatures to a nominating petition (id. §17-122(4)), no nominating petition can be filed unless there is sufficient volunteer support in the community comprising party members willing to pack a petition and collect the necessary signatures thereon, as well as sufficient supporters to sign. Undoubtedly, other means to deal with the problem perceived by Professor Fuchs and this Court could be found. However, the run-off primary triggered at a level of less than 40% is not one of them, because in its effect, and by its intent, it discriminates against and dilutes the voting power of minority voters and adversely affects minority candidates.

Conclusion

For the reasons set forth above, plaintiffs are entitled to declaratory and injunctive relief as requested. A final judgment should be submitted on three (3) days notice (personal service) or on waiver of notice, which shall reserve jurisdiction to determine and award counsel fees for plaintiff.

Since the Court regards the issues as clear, and in light of the significant expense imposed on candidates, and on the City itself, by a run-off primary, it would seem inappropriate to stay the effect of the judgment pending appeal, assuming that the primary results in 1985 might invoke the statute. Defendants may be deemed to have moved in this Court for a stay pending appeal, and the motion is denied. See Rule 8, F.R.App.P.

So Ordered.

Dated: White Plains, New York
August 13, 1985

Charles L. Brieant, U.S.D.J.

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1635

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

REVEREND CALVIN O. BUTTS, III and DIGNA SANCHEZ, on behalf of themselves and other similarly situated,

Petitioners,

-against-

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, COMMISSIONERS MATTEO LUMETTA, FERDINAND C. MARCHI, ROSEMARY A. MILLUS, JOSEPH J. PREVITE, MARTIN RICHARDS, JAMES S. BASS, ALICE SACHS, ANTHONY SADOWSKI, BETTY DOLEN, Executive Director, ROBERT S. BLACK, President, and ORLANDO VELEZ, Secretary,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 23, 1986

QUESTION PRESENTED

Does New York Election Law §6-162, which requires that if no candidate for the offices of Mayor, City Council President, or Comptroller of the City of New York receives 40% or more of the votes cast in a party's general primary election, a run-off primary between the two top vote-getters shall be conducted, have the effect of denying to minority voters an equal opportunity to participate in the political process?

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STATEMENT OF THE CASE

Petitioners, consisting of a class of all present and/or potentially eligible black and

Hispanic voters in the City of New York,[1] commenced this action in October 1984, seeking injunctive and declaratory relief holding that New York Election Law §6-162 ("§6-162" or "run-off statute") violates Sections 1 and 2 of the Voting Rights Act (42 U.S.C. §§1971, 1973), the Civil Rights Act (42 U.S.C. §§1981, 1983), and the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. On December 21, 1984, the Attorney General of the State of New York submitted a consent order dismissing the action as against the State and the Governor.[2] The remaining defendants in the

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[1]On February 11, 1985, the district court issued an order declaring this is a class action and requiring notice of pendency of this action to all class members.

[2]Although the State of New York did not appear as a party in the district court, it (Footnote Continued)

district court were the City of New York and its Board of Elections.

After a bench trial, Judge Brieant of the Southern District of New York, in a 73-page Memorandum and Order, dated August 13, 1985 (App. 39a-166a),[3] concluded that Election Law §6-162 violated the Fourteenth Amendment and Section 2 of the Voting Rights Act and granted petitioners the declaratory and injunctive relief they had requested.[4] In a Final Order dated August 16, 1985, the district court enjoined

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(Footnote Continued)
submitted an amicus brief in the Second Circuit urging reversal of the district court opinion.

[3]References are to pages of the Appendix submitted in support of the petition for a writ of certiorari.

[4]The district court also held that Election Law §6-162 did not deny petitioners their rights under the First or Thirteenth Amendments, and found it unnecessary to reach petitioners' Fifteenth Amendment claim (App. 133a, 161a).

respondents from conducting any run-off primary elections pursuant to §6-162. A Notice of Appeal was filed by respondents on August 16, 1985.

Due to the close proximity of the 1985 primary elections, respondents requested that the appeal be expedited, which request was granted by the Second Circuit. In a decision issued December 13, 1985, a panel of the Second Circuit (Oakes, dissenting) reversed the judgment of the district court, "[b]ecause the record shows that the primary run-off law was never intended to deny minority voters--and does not have the effect of denying them--an equal opportunity to participate in the political process...." (App. 6a.)

The Second Circuit concluded that the district court's finding that §6-162 was enacted with a discriminatory purpose was clearly erroneous (App. 12a, 17a);

accordingly, it reversed the district court's holding that the run-off law violates the Equal Protection Clause of the Fourteenth Amendment (App. 17a).[5] After reviewing the analysis adopted by Judge Brieant in addressing the issue of legislative intent, the Court concluded that "the district court minimized evidence probative of the legitimacy of the law, and as a result, drew all inferences against its constitutionality." (App. 15a.)

The Second Circuit likewise found to be improper the analysis adopted by the district court with respect to the Voting Rights Act claim. The Second Circuit held that the district court erred in its interpretation of what type of review is required under the

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[5]Petitioners do not challenge the holding that §6-162 does not violate the Equal Protection Clause. See Petition, p. 11, n.1.

"results test", which is incorporated in amended Section 2 of the Voting Rights Act. The Court found that the lower court had failed to focus on the basic issue presented under Section 2, i.e., whether the run-off statute denies to racial minorities fair and equal access to the political process (App. 17a-18a). Recognizing that in elections for single-member offices, such as those conducted in New York City for the offices of Mayor, City Council President, and Comptroller, the rule has always been that the candidate with the most votes wins (App. 19a-20a), the Court concluded that the run-off election requirement "does not deny any class an opportunity for equal representation and therefore cannot violate the Act." (App. 19a.) Additionally, the Court found especially persuasive the fact that the run-off statute "has not yet had any negative effect on a minority candidate;

indeed, it is not at all clear which way the law will cut - it may help a minority candidate to win nomination." (App. 21a) (emphasis in original). Accordingly, the Second Circuit reversed the judgment of the district court, with direction to dismiss the complaint (App. 25a).

REASONS FOR DENYING A WRIT OF CERTIORARI

In considering petitioners' claim under Section 2 of the Voting Rights Act, the Second Circuit conducted a proper analysis of Election Law §6-162, by focusing, as the district court failed to do, on the question of whether the law denies to racial minorities fair and equal access to the political process. In addition, the Second Circuit gave due consideration to the important distinctions between this case and other voting rights cases where run-off requirements have been challenged, since this is the first such case in which the requirement operates in the absence of some other voting practice or procedure which may deny minorities access to the political process or dilute their voting strength (App. 18a-19a). The Court correctly determined that this run-off law was not

intended to, and does not have the effect of, discriminating against minority voters.

Background of Election Law §6-162

The enactment of the run-off statute was prompted by the results of the 1969 election for Mayor of New York City (App. 6a). In that year, Mario Procaccino won the Democratic Party primary election with 33% of the votes cast and, as a result, became the Democratic Party's nominee in the general election. Mr. Procaccino's opponents in the primary were Herman Badillo, Robert Wagner, Norman Mailer, and James Scheuer. Procaccino, a relatively conservative candidate, had obtained a plurality vote in the primary when the party's mainstream vote split between Herman Badillo and Robert Wagner, who received 28% and 29% of the primary vote, respectively. In the general election, Mr. Procaccino's opponents were

John Marchi, the Republican Party nominee, and incumbent John Lindsay, who ran as an Independent and as the Liberal Party nominee. Mr. Lindsay won the general election with 42% of the votes cast.

In 1972, a bill was introduced in the New York State Legislature by Assemblymen Stanley Steingut and Albert Blumenthal which provided that in cities with a population of one million or more, when no candidate for the office of Mayor, City Council President, or Comptroller receives 40% or more of the votes cast in a primary election, the New York City Board of Elections shall hold a run-off primary between the two top vote-getters on the second Tuesday next succeeding the date on which the initial primary election was held.[6]

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[6]In 1976 and 1978, the run-off statute was
(Footnote Continued)

The few opponents to the run-off bill argued that it could have the effect of preventing blacks or Hispanics from being elected to the three city-wide offices. However, the proponents of the bill explained that the run-off requirement would serve the important purpose of insuring that party candidates truly represent the ideologies of a substantial plurality of the electorate. State Senator Robert Garcia, an Hispanic, who was at the time a leading supporter of Herman Badillo's planned mayoral candidacy in 1973, voted in favor of

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(Footnote Continued)
amended to provide, inter alia, that its terms were to apply to the City of New York, rather than cities with a population of one million or more. (Because no other city in New York State has a population of one million or more, the statute has never applied to any jurisdiction other than New York City.) In addition, the requirement that the run-off primary election be held on the second Tuesday after the date of the initial primary was deleted. See L.1976, c.233 §1; L.1978, c.373, §65.

the run-off bill, and stated in the legislative debate that Mr. Badillo, an Hispanic, had told him that he supported the law (App. 8a). The run-off bill passed in the State Assembly with virtually no opposition, all five black and Hispanic Assemblymen from New York City voting in favor of it (App. 8a). By votes of 49-8 in the State Senate and 104-5 in the Assembly, the run-off statute (then Election Law §131-a) became law in June, 1972 (L. 1972, c.877, §1).

In 1973, Mario Procaccino unsuccessfully challenged the newly-enacted run-off statute in New York Supreme Court. Procaccino v. Board of Elections, 73 Misc.2d 462, 341 N.Y.S.2d 810 (Sup. Ct. N.Y. Co. 1973). Mr. Procaccino's contentions that the run-off statute was unconstitutional as violative of, inter alia, the Fourteenth Amendment of the United States Constitution and the Home Rule provision of the New York State Constitution

(N.Y. Const., Art. IX, §2, subd.[b]) were rejected by the State Supreme Court. The Court found that since the statute related to a matter of State concern (i.e., the election process), the Home Rule provisions were not violated by the State's enactment of a run-off law which applied only to New York City. As to the challenges under the United States Constitution, the Supreme Court held that the run-off statute did not deprive Procaccino of any rights protected by the Fourteenth Amendment's Due Process Clause, since the law does not deprive any voter of the right to vote, or by the Equal Protection Clause, since the enactment "has a rational basis, to wit, the implementation of 'effective local self-government.' " 73 Misc.2d at 470, 341 N.Y.S.2d at 818-19.

The Actual Effects of Election Law §6-162

Since the enactment of the run-off statute in 1972, three run-off primary elections have been held in New York City. All three run-off elections were held in Democratic Party primaries; two were held for the office of Mayor (1973 and 1977), and one was held for the office of City Council President (1977).

In 1973, there were four candidates in the Democratic Party primary for Mayor--Mario Biaggi, Albert Blumenthal, Herman Badillo and Abraham Beame. The percentages of the total votes which each of the candidates obtained were as follows:

Abraham Beame	34.5%
Herman Badillo	29%
Mario Biaggi	20.5%
Albert Blumenthal	16%

A run-off election was held in which Mr. Badillo[7] and Mr. Beame received the following percentages of the total votes cast:

Abraham Beame	61%
Herman Badillo	39%

In 1977, there were seven candidates seeking the Democratic Party nomination for Mayor--Bella Abzug, Herman Badillo, Abraham Beame, Mario Cuomo, Joel Harnett, Edward Koch, and Percy Sutton.[8] The results of the initial primary election were as follows:

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[7]Herman Badillo is the only black or Hispanic candidate to have participated in a run-off election in New York. Mr. Badillo conceded, at trial, that he would not have obtained the Democratic Party nomination in 1973 even if there had been no run-off requirement.

[8]Prior to his 1977 bid for the mayoralty, Mr. Sutton, who is black, had served as Manhattan Borough President, being elected to that office on several occasions by substantial and overwhelming margins, by an electorate which was primarily white, while running against white candidates.

Edward Koch	20%
Mario Cuomo	19%
Abraham Beame	18%
Bella Abzug	16.5%
Percy Sutton	14%
Herman Badillo	11%
Joel Harnett	1.5%

Mr. Koch was the winner of the 1977 runoff primary which subsequently was held between himself and Mr. Cuomo, obtaining 55% of the total votes cast in that election.

The other run-off primary held in 1977 was in the Democratic Party primary for nomination for the office of City Council President. In the initial primary,[9] the results were as follows:

Paul O'Dwyer	31%
Carol Bellamy	25%
Carter Burden	20%
Abraham Hirschfeld	17%
Leonard Stavisky	7%

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[9]None of the five candidates in the 1977 primary for City Council President was black or Hispanic.

In the run-off election, Ms. Bellamy, "who seemed something of an 'outsider' at the time" (App. 22a), defeated incumbent Paul O'Dwyer, receiving 59% of the run-off vote.

As is apparent from an analysis of the history of the statute's operation, the run-off law has not operated to deprive any black or Hispanic candidate of election to an office to which he otherwise would have been elected. Rather, the actual effect of Election Law §6-162 has been: (1) to give a minority candidate (Herman Badillo) a second chance to obtain the Democratic Party nomination, in 1973; (2) to prevent a candidate receiving only 20% of the initial primary vote from automatically receiving the Democratic Party mayoral nomination, in 1977, during the depths of the City's fiscal crisis; and (3) to permit an insurgent finishing second in the 1977 Democratic Party primary for City

Council President to defeat the incumbent in the run-off primary.

The Run-Off Statute Does Not Deny Blacks or Hispanics An Equal Opportunity to Participate In the Electoral Process

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, as amended in 1982, provides that it is unlawful for a State or political subdivision to impose any voting practice or procedure "in a manner which results in a denial or abridgement of the right ... to vote on account of race or color...." 42 U.S.C. §1973(a). Subsection (b) of Section 2 sets forth the following detailed explanation of what constitutes a denial of the right to vote:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have

> less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis added.)

The Second Circuit properly held that the New York run-off statute does not deny any class of citizens the right guaranteed by Section 2 of the Voting Rights Act, i.e., to participate equally in the political process (App. 18a-19a). Rejecting the district court's overly mechanical application of the "results test", the Second Circuit fairly appraised the actual effects of the statute, in its thirteen-year history, as well as its

possible discriminatory effects.[10] The analysis conducted by the Second Circuit, which gave due consideration to the facts of this particular case, is precisely the type of analysis which Congress deemed appropriate when it amended Section 2 of the Voting Rights Act to incorporate the "results test":

> [Amended §2] requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case of whether the voting strength of minority voters is ... minimized or canceled out.

1982 U.S. Code Cong. & Admin. News, at 207 (emphasis added). See also United States

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[10]Since it was undisputed that the run-off statute had not had any actual discriminatory effect, the Court considered whether petitioners could challenge the law based solely upon its "anticipated" harmful effect (App. 21a, n.5). Although it found "unsettled whether Section 2 can be violated at all in the absence of discriminatory results...," the Court concluded that petitioners could challenge §6-162 on the basis of anticipated discriminatory impact (id.) (emphasis in original).

v. Marengo County Commission, 731 F.2d 1546, 1565 & n.32 (11th Cir.), cert. denied, ___ U.S. ___, 105 S. Ct. 375 (1984); Major v. Treen, 574 F. Supp. 325, 350 (E.D. La. 1983).

The Second Circuit properly considered only those factors which it deemed relevant to the issue of whether Election Law §6-162 denies minority voters the opportunity to participate equally in the electoral process. In addition, the Court appreciated the important distinction between elections for multi-member bodies and those for single-member offices:

> A run-off requirement can exacerbate the unfair effect of at-large voting for a multi-member body, and has been invalidated in that context. See City of Rome [v. United States, 446 U.S. 156 (1980)].
>
> We cannot, however, take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies

to that of elections for single-member offices.

(App. 18a-19a.)

The Court found this distinction between elections for multi-member bodies and single-member offices to be implicit in this Court's holding in City of Port Arthur v. United States, 459 U.S. 159 (1982), where a run-off requirement appended to the City's at-large voting system for seats on the multi-member City Council was found to violate §5 of the Voting Rights Act (42 U.S.C. §1973c),[11] and yet a similar run-off requirement for the election for the City's

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[11]Section 5 of the Act requires that when a "covered" State or political subdivision seeks to change any standard, practice, or procedure with respect to voting, it must first obtain pre-clearance from the Attorney General of the United States or a declaratory judgment from the District Court for the District of Columbia that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race.

Mayor was not challenged or even mentioned in the Court's opinion (App. 19a). While recognizing that there are indeed devices which may have the effect of denying minority voters an equal voice in the electoral process, the Second Circuit nevertheless determined that, in the case of the three primary elections to which §6-162 applies, the run off requirement does not deny any class such an equal voice (App. 19a).

Because the winner of the three affected elections is chosen directly by all eligible voters, and that fact is not affected by the electoral scheme imposed by §6-162, there is not and cannot be any denial of an equal opportunity to participate in the political process (App. 19a). Cf. Jones v. Lubbock, 727 F.2d 364, 386 (5th Cir. 1984) (court invalidated at-large system for electing city council members, but upheld a

plan to replace it with six single-member districts).

Rather than establishing a hard and fast rule governing elections to single-member offices, the Second Circuit specifically limited its holding to the statute in question and to the particular context in which it operates:

> [S]o long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. We need not determine whether such opportunity could ever be denied in the context of an election to a single-member office. It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act.

(App. 19a) (emphasis added).

Despite the obvious logic in the approach adopted by the Second Circuit in addressing the Voting Rights Act claim,

petitioners maintain that the Court should have engaged in the same type of "totality of the circumstances" analysis performed by the district court.[12] See Petition, p. 31. However, the "totality of the circumstances" test adopted by Congress when it amended Section 2 of the Voting Rights Act in 1982 does not require a court to treat the "typical factors" set forth by Congress as mere items on a checklist which must affirmatively be established in order to reach a determination whether a particular statute or practice has a discriminatory effect. Rather, a court in a

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[12]In amending Section 2 of the Voting Rights Act, Congress suggested nine "typical factors" which a court might consider in determining whether, "based on the totality of the circumstances", the political process is not equally open to participation by the minorities. See 1982 U.S. Code Cong. & Admin. News, at 206-07. The district court was persuaded that petitioners had met their burden of proof on six of the nine "typical objective factors" listed in the Senate Report (App. 112a-132a).

voting rights case is required to conduct an analysis of those factors that are relevant to the issues in the particular case. The court clearly is not limited to a consideration of the nine "typical factors" suggested by Congress, nor is it bound to consider each:

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device...

1982 U.S. Code Cong. & Admin. News, at 207.

Notwithstanding its determination that it was inappropriate for the district court to consider only those "typical factors" set forth in the Senate Report which accompanied the 1982 amendments to the Voting Rights Act, the Second Circuit reviewed the district court's factual findings as to five of those factors (App. 22a-24a). Although it found that there was no need to reach a determination as to whether those

factual findings were "clearly erroneous", the Court stated its view that some of the district court's findings were "highly questionable" (App. 22a).

Thus, even if it were necessary to review the factual findings reached by the district court with respect to those "typical factors" which it considered relevant, this Court would find them to be "clearly erroneous." For example, the district court's finding that the state policy underlying the run-off statute is "tenuous" was based solely upon its conclusion that the statute was designed and enacted with a discriminatory purpose (App. 129-130a). This determination was without any factual basis. As noted above (see p. 11-12, supra), the run-off bill was supported by State Senator Robert Garcia, who stated in the legislative debate that Herman Badillo also supported the law, and all five black and Hispanic Assemblymen

from New York City voted in favor of the run-off bill (App. 8a). Since the district court's finding as to the purpose of the run-off law has been held to be clearly erroneous (and petitioners do not challenge that holding), the finding of a tenuous state policy must also fall (App. 24a).

Likewise, the district court's factual finding that political campaigns in New York City have been characterized by racial appeals was clearly erroneous, since it was based on evidence concerning only a single instance of such appeals, i.e., the use of "racially slanted campaign tactics" in the 1973 run-off primary (App. 117a-119a). The district court improperly failed to consider the absence of racial appeals in any other elections in which minorities were candidates (App. 22a-23a), as it was required to do. See Latino Political Action Committee v. City of Boston, 609 F. Supp. 739, 744-45 (D.

Mass. 1985); Black Voters v. McDonough, 421 F.Supp. 165, 190 (D. Mass. 1976), aff'd, 565 F.2d 1 (1st Cir. 1977).

Although the district court recognized that minorities have enjoyed considerable success in gaining election to public office in New York City, it dismissed this evidence based solely on the fact that none of the elections involved offices to which the run-off statute applies (App. 129a). This refusal by the district court to consider elections other than those to which the challenged practice or statute applies, in examining this factor under Section 2, was clearly improper. See, e.g., United States v. Marengo County Comm., supra, 731 F.2d at 1572; NAACP v. Gadsden County Sch. Bd., 691 F.2d 978, 983 (11th Cir. 1982).

As demonstrated above, the Court of Appeals correctly concluded that New York Election Law §6-162, which was enacted in

1972 with overwhelming support in the State Legislature, including that of almost all black and Hispanic legislators, and which was designed to prevent election results such as those which had occurred in the 1969 mayoral election in New York City, and which has not had any negative effect on a minority candidate in its thirteen-year history--but indeed may help a minority candidate to win nomination--does not deny to minority voters an equal opportunity to participate in the political process.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 23, 1986.

Respectfully submitted,

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